Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

"THE PUBLIC ENTITIES," and/or "PROGRAMS OR ACTIVITIES," of CITY OF TUCSON, and the TUCSON POLICE DEPARTMENT (TPD), and its CHIEF SMITH, and CAPTAIN(S) LEVITT, DAYKIN, DANAHER, AND OTHER OFFICERS AND DETECTIVES LISTED AT "2A-2B", and MAYOR MILLER,

Petitioners,

v.

DENNIS DAVID McCULLEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the granting of a petition for post-conviction relief due to ineffective assistance of counsel result in a 'favorable termination' of the underlying criminal convictions pursuant to *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, if the charges remained pending after the petition was granted?

2. Was it consistent with statutory and case law for the Ninth Circuit Court of Appeals to broadly grant, with no clarification, a Pro Se Appellant's Motion for Judicial Notice that consisted of fourteen pages of concepts, his interpretations of writings, and "facts," some of which are highly disputed material facts, incapable of accurate and ready determination by resort to sources provided by Appellant, that are unreasonably prejudicial to Appellees?

3. Was it consistent with the federal rules of evidence and with case law for the Ninth Circuit Court of Appeals to grant the Motion for Judicial Notice when the motion was filed with Appellant's Answer to Appellees' Request for Rehearing and was an integral part of that Answer, without allowing Appellees to respond?

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DECISIONS BELOW

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgments below.

The Memorandum Decisions of the Ninth Circuit Court of Appeals dated June 19, 2003, and February 12, 2004, and the Order of August 4, 2004 which denied Appellees' Petition for Rehearing and granted Appellant's Motion for Judicial Notice are unpublished. A copy of each of these decisions and of the Order appear in the Appendix to this Petition for Certiorari.

None of these Orders/Decisions is republished herein, as they are included within the Appendix to this Petition for Certiorari.

JURISDICTION

The order and judgment of the Ninth Circuit Court of Appeals, upon which this Petition for Writ of Certiorari is based, were entered on August 12, 2004. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The statutes and rules involved are Rule 201, Federal Rules of Evidence; Rule 40(a)(3), Federal Rules of Appellate Procedure; and Rule 32.1, Arizona Rules of Criminal Procedure, set out in full as follows:

1. Rule 201, Federal Rules of Evidence

Rule 201, Federal Rules of Evidence. Judicial Notice of Adjudicative Facts.

(a) **Scope of Rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) **When Discretionary.** A court may take judicial notice, whether requested or not.

(d) **When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) **Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.

(g) **Instructing Jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

2. Rule 40(a)(3) Federal Rules of Appellate Procedure

Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

3. Rule 32.1, Arizona Rules of Criminal Procedure

Scope of Remedy:

> Subject to the limitations of Rule 32.2, any person who has been convicted of, or sentenced for, a criminal offense may, without payment of any fee, institute a proceeding to secure appropriate relief.
>
> Any person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest shall have the right to file a post-conviction relief proceeding, and this proceeding shall be known as a Rule 32 of-right proceeding.
>
> Grounds for relief are:
>
> a. The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;
>
> b. The court was without jurisdiction to render judgment or to impose sentence;
>
> c. The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;

d. The person is being held in custody after the sentence imposed has expired;

e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:

(1) The newly discovered material facts were discovered after the trial.

(2) The defendant exercised due diligence in securing the newly discovered material facts.

(3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines the testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.

f. The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part; or

g. There has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence; or

h. The defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty.

Arizona Revised Statute § 13-907 Setting aside judgment of convicted person on discharge; making of application; release from disabilities; exceptions

A. Except as provided in subsection b of this section, every person convicted of a criminal offense may, upon fulfillment of the conditions of probation or sentence and discharge by the court, apply to the judge, justice of the peace, or magistrate's successor in office to have the judgment of guilt set aside. The convicted person shall be informed of this right at the time of discharge. The application to set aside the judgment may be made by the convicted person or by the convicted person's attorney or probation officer authorized in writing. If the judge, justice of the peace or magistrate grants the application, the judge, justice of the peace or magistrate shall set aside the judgment of guilt, dismiss the accusations or information and order that the person be released from all penalties and disabilities resulting from the conviction other than those imposed by the department of transportation pursuant to section 28-3304, 28-3306, 28-3307 or 28-3308, except that the conviction may be used as a conviction if such conviction would be admissible had it not been set aside and may be pleaded and proved in any subsequent prosecution of such person by the state or any of its subdivisions for any offense or sued by the department of transportation in enforcing the provisions of section 28-3304, 28-3306, 28-3307, or 28-3308 as if the judgment of guilt had not been set aside.

B. This section does not apply to a person convicted of a criminal offense:

1. Involving the infliction of serious physical injury.

2. Involving the use or exhibition of a deadly weapon or dangerous instrument.

3. For which the person is required or ordered by the court to register pursuant to section 13-3821.

4. For which there has been a finding of sexual motivation pursuant to section 13-118.

5. In which the victim is a minor under fifteen years of age.

6. In violation of section 28-3473, any local ordinance relating to stopping, standing, or operation of a vehicle or title 28, chapter 3, except a violation of section 28-693 or any local ordinance relating to the same subject matter as section 28-693.

STATEMENT OF THE CASE

In September 1995, Dennis McCulley was arrested, charged with, and convicted of two counts of Aggravated Assault with a Dangerous Weapon on a Police Officer Engaged in Official Duties. The arrest resulted when two Tucson police officers responded to McCulley's home to check his welfare after he made phone calls to 911, including a call in which he hung up before talking to the 911 operator, and a call wherein he stated an unknown person was banging on his door asking for help.

The officers did a protective sweep of the house, found McCulley to be alone and unhurt, and soon after prepared

to leave. McCulley then became very upset, at turns crying, screaming, mumbling, and rocking back and forth, and saying he wanted to die. While the police officers, concerned for McCulley's safety, tried to determine what to do, he ran at them with a large knife pointed towards them. He was then shot by one of the officers. McCulley was convicted of two counts of Aggravated Assault with a Deadly Weapon on a Police Officer Engaged in any Official Duty.

On June 18, 1999, McCulley applied to the criminal court for post-conviction relief on the basis of ineffective assistance of counsel, pursuant to Rule 32, Az. R. Crim. P. The application was granted on that basis on January 4, 2000. (Appendix at G). The charges against McCulley remained pending, however, and a status conference was set on a Motion to Modify Conditions of Release. *Id.* At the status conference his conditions of release were set forth and he was given a new status conference date.

On October 23, 2001, McCulley pled no contest to the two charges, amended to the lesser-included offenses of Aggravated Assault on a Police Officer Engaged in Any Official Duty. (Appendix at H).

In August 1998, before he'd filed the petition for post-conviction relief, McCulley, then a prisoner, filed *pro se* a 37-count complaint against the officers and other police, city, county, and judicial personnel, alleging violations of various constitutional rights. The case was dismissed on July 15, 2002, by the district court pursuant to a motion for summary judgment predicated on a statute of limitations argument.

McCulley appealed the dismissal to the Ninth Circuit Court of Appeals. The Ninth Circuit upheld the district

court decision on June 19, 2003. (Appendix at C). McCulley then filed a Request for a Rehearing. McCulley claimed, among other things, that his case should not have been dismissed because there was a favorable termination of the underlying criminal charges, referring to the granting of his Rule 32 post-conviction relief petition. Appellees did not file an Answer to the Request for Rehearing because Rule 40(a)(3) of the Federal Rules of Appellate Procedure does not allow for an Answer without request from the Court.

In a Memorandum Decision dated February 12, 2004, the Ninth Circuit Court of Appeals denied McCulley's Motion for Reconsideration, but it withdrew its previous memorandum disposition and replaced it with a new one that stated that McCulley could go forward with his § 1983 claims of false arrest, false imprisonment, and warrantless search and seizure, because those claims could not have been brought until the successful termination of the underlying charges, pursuant to *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994). The Court pointed to the Rule 32 decision, overturning McCulley's criminal convictions for ineffective assistance of counsel. (Appendix at D).

Meanwhile, McCulley applied to have his judgment of guilt set aside, pursuant to Arizona Revised Statute § 13-907. On April 1, 2004, the criminal trial judge granted the application, found McCulley had been rehabilitated, ordered the convictions set aside and vacated, and released McCulley from all penalties and disabilities resulting from the convictions.

The Appellees filed a Motion for Reconsideration of the Ninth Circuit's February 12, 2004 decision, citing a material mistake of fact and law: the underlying criminal

charges were never dismissed, McCulley eventually pled no contest to lesser-included offenses, and those convictions have never been overturned. The Ninth Circuit allowed McCulley to file an Answer. (Appendix at E). Along with his Answer he filed a fourteen-page motion that was an integral part of his Answer, entitled: "Motion for Judicial Notice and Motion for the Remainder of or Related Writings or Recorded Statements Under Federal Rules of Civil Procedure, Rules of Evidence, 106 and 803." The motion asked the Ninth Circuit Court of Appeals to take judicial notice of highly disputed material facts, broad ambiguous concepts, and various pleadings and documents filed in state and federal court, along with McCulley's interpretation of the meaning of those documents and pleadings. (Appendix at F). He had not sought permission, nor had the Court granted him permission, to file this Motion. The Appellees did not respond, relying on Fed. R. App. P. 40(a)(3), which does not permit any further pleadings beyond the petition for rehearing to be filed absent a request from the Court.

Counsel for Appellees fully anticipated the Court of Appeals would either strike McCulley's "Motion for Judicial Notice and Motion for the Remainder of or Related Writings or Recorded Statements Under Federal Rules of Civil Procedure, Rules of Evidence, 106 and 803" as a pleading filed at the petition for rehearing stage without permission from the court, or at the very least, request Appellees respond to the Motion for Judicial Notice before granting it. But neither occurred. The next action by the Court of Appeals was the Order of August 4, 2004, stating only: "McCulley's motion for judicial notice is granted. The City of Tucson's petition for panel rehearing is denied. No further filings shall be accepted in this closed appeal."

(Appendix at A). The Mandate was certified by the Ninth Circuit Court of Appeals on August 12, 2004, and was filed in the district court on August 20, 2004.

Appellees sent four motions to the Ninth Circuit on August 19, 2004: an Objection to the Taking of Judicial Notice; a Motion for Stay of Mandate Pending Filing of a Petition for a Writ of Certiorari to the United States Supreme Court; a Motion for Clarification; and a Request for an Opportunity to be Heard on the Taking of Judicial Notice. The Ninth Circuit Court of Appeals responded by again sending its Order of August 4, 2004, to Appellees, but this time with the line, "No further filings shall be accepted in this closed appeal" highlighted in yellow. The Appellees' Objection to the Taking of Judicial Notice was attached, showing a date of receipt at the Court of Appeals of August 20, 2004.

The Ninth Circuit Court of Appeals' taking of judicial notice of apparently everything in McCulley's fourteen-page motion creates immense confusion and unfair prejudice to the Appellees.

BASIS OF JURISDICTION OF THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The granting of the petition for post-conviction relief due to ineffective assistance of counsel did not result in a 'favorable termination' of the underlying criminal convictions pursuant to *Heck v. Humphrey* because the charges remained pending even after the petition was granted.

Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, applies not only to convictions, but also to pending criminal charges. *Harvey v. Waldron*, 210 F.3d 1008, 1014 (9th Cir. 2000) ("*Heck* applies to pending criminal charges, and . . . a claim that if successful would necessarily imply the invalidity of a conviction in a pending criminal prosecution, does not accrue so long as the potential for a criminal conviction in the pending criminal prosecution continues to exist.").

The objectives of this Court's holding in *Heck* – to preserve the consistency and finality of a conviction, and to prevent collateral attacks on a conviction through a civil lawsuit – are equally applicable "to claims that, if successful, would necessarily imply the invalidity of a future conviction on a pending criminal charge." *Smith v. Holtz*, 87 F.3d 108, 113 (3rd Cir. 1996), quoted in *Harvey*, 210 F.3d at 1014.

If McCulley had brought his § 1983 action after the ruling on his Rule 32 petition, but before the conclusion of his criminal case, he would have been challenging the legality of a possible future conviction and there would be the potential for inconsistent determinations in the civil and criminal cases. McCulley would be collaterally attacking the prosecution in the civil suit. *See Harvey*, 210 F.3d at 1014. The federal court could have abstained from

jurisdiction pending the results in state court, but in the final result would have had to dismiss the case due to McCulley's ultimate convictions.

The Setting Aside of Judgment pursuant to Arizona Revised Statute § 13-907 is also not a termination in McCulley's favor. "The statute itself is proof that restoration of civil rights . . . does not expunge or remove the *fact* of conviction in Arizona." *Russell v. Royal Maccabees Life Ins. Co.*, 193 Ariz. 464, 468, 974 P.2d 443, 447 (1998) (emphasis in original). The statute simply releases the convicted person from penalties and disabilities resulting from the conviction, it is not a commentary on the merits of the underlying case.

California has a statute very similar to A.R.S. § 13-907: California Penal Code § 1203.4. In the case of *In re Phillips*, 17 Cal.2d 55, 109 P.2d 344 (1941), the California Supreme Court concluded:

> The power of the court to reward a convicted defendant who satisfactorily completes his period of probation by setting aside the verdict and dismissing the action operates to mitigate his punishment by restoring certain rights and removing certain disabilities. *But it cannot be assumed that the legislature intended that such action by the trial court under section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime.* This is made clear by the provision that . . . the defendant's conviction can be used against him in any later prosecution, despite dismissal of the action under section 1203.4. In brief, action in mitigation of the defendant's punishment should not affect the fact that his guilt has been finally

> determined according to law. . . . *That final judgment of conviction is a fact. . . .*"

Id. 109 P.2d at 347-48. (emphasis added).

1. Federal Rule of Evidence 201 and fundamental fairness preclude the Ninth Circuit Court of Appeals from taking judicial notice of everything asked for in McCulley's motion.

Federal Rule of Evidence 201 is very specific about what kinds of facts can be judicially noticed. Rule 201(b) limits the kinds of facts that can be judicially noticed to the following:

> "A judicially noted fact must be one not subject to reasonable dispute in that it is either:
>
> (1) Generally known within the territorial jurisdiction of the trial court or
>
> (2) Capable of accurate and ready determination by resort to sources whose accuracy can not reasonably be questioned."
>
> As near as undersigned counsel can discern, McCulley's Motion for Judicial Notice requested the court take judicial notice of the following:

1. "McCulley contends that this Court of Appeals may take Judicial Notice of pleadings filed in related state Court action." (Page 3, Appellant's Motion for Judicial Notice, Appendix at F).

2. "Whether there is evidence that McCulley's ultimate conviction and sentence was a 'favorable termination' and were not based on the original complaint." (Page 3, Appellant's Motion for Judicial Notice, Appendix at F).

3. "Whether there was evidence that the trial court determined that McCulley's mental condition was relevant." (Page 3, Appellant's Motion for Judicial Notice, Appendix at F).

4. "That [McCulley] did not charge the two officers with a deadly weapon, to wit: a knife." (Page 3, Appellant's Motion for Judicial Notice, Appendix at F).

5. That "*Heck v. Humphrey*, 512 U.S. 477, 487, 114 S.Ct. 2364, 2372 (1994) is not applicable." (Page 5, Appellant's Motion for Judicial Notice, Appendix at F).

6. That "McCulley was ultimately found not guilty, period." (Page 12, Appellant's Motion for Judicial Notice, Appendix at F).

7. "This Court can also take judicial notice of documents filed in state court actions that were relevant to mater (sic) at hand." (Page 14, Appellant's Motion for Judicial Notice, Appendix at F).

Each of these will be discussed in turn.

2. McCulley contended that the Court of Appeals may take judicial notice of pleadings filed in related state court action.

"While a court may take judicial notice of a judicial or administrative proceeding which has a 'direct relation to matters at issue,' a court can only take judicial notice of the *existence* of those matters of public record, that is, the existence of a motion or of representations having been made therein, but not of the *veracity* of the arguments and disputed facts contained therein." *U.S. v. Southern California Edison Co.*, 300 F.Supp.2d 964, 974 (2004) (emphasis in

original). A court may take judicial notice of the existence of certain matters of public record, but not of one party's opinion of how a matter of public record should be interpreted. *Id.*

McCulley asked the Court to take judicial notice not just of the fact of pleadings and papers filed in state court, which may be proper, but also of his disputed interpretations of those pleadings and papers which is not proper. He asked the court to do exactly what case law and Rule 201, Fed. R. Evid., prohibit.

For example, McCulley asked the Court of Appeals to take judicial notice of his Rule 32 Petition and the testimony from the evidentiary hearing and states that these "clearly address the issues of McCulley's mental conditions, and are supported by the arguments made in *Drummond Ex. Rel., Drummond v. City of Anaheim* (cite omitted), this court may consider . . . McCulley's Rule 32 Evidentiary Hearing, at pages . . . , clearly (sic) show McCulley's mental condition, before, during, and after the incident of September 7, 1995." (Page 5, Motion for Judicial Notice, Appendix at F).

McCulley asked the Court to determine, based on a criminal court minute entry, an Order, and a transcript, that he did not charge the officers with a deadly weapon, yet that is not what these documents say; it is only his misinterpretation of these documents. This is a highly disputed material fact. The Court of Appeals cannot take judicial notice of these sorts of "facts."

3. McCulley contended the Court of Appeals could take judicial notice that "There is evidence [his] ultimate conviction and sentence were a 'Favorable Termination' and were not based on the original complaint."

What does this mean? By granting McCulley's Motion for Judicial Notice did the Court of Appeals take judicial notice that because McCulley was ultimately convicted of lesser-included offenses instead of the originally charged offenses this is *evidence* of a favorable termination? It always has been, and continues to be, the position of the Appellants that the reduction of McCulley's original charges to lesser-included offenses through plea-bargaining was not a "favorable termination" that bars application of the *Heck v. Humphrey* rule, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

Heck v. Humphrey requires a *termination* of the prior criminal proceeding in favor of the accused. The purpose is to:

> "avoid parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [*sic*] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction."

Heck, 512 U.S. at 484, 114 S.Ct. at 2371, *quoting* 8 S. Speiser, C. Krause, & A. Gans, *American Law of Torts* § 28:5, p. 24 (1991).

McCulley was convicted. He was sentenced. His convictions have not been overturned.

The granting of the Rule 32 post-conviction petition that vacated the original convictions and sentence did not result in a favorable termination; the charges remained in effect, and McCulley later pled no contest to the lesser-included offenses.

In any event, "whether there is evidence McCulley's ultimate conviction and sentence was a 'favorable termination' and were not based on the original complaint" is not a proper subject for judicial notice.

4. McCulley contended the Court of Appeals could take judicial notice that there is evidence that the trial court determined that [his] mental condition was relevant.

Again, what does this mean? The appellate court should not speculate about what the district court or the superior court criminal judges were thinking when making a particular ruling. In other words, the appellate court should not have taken judicial notice of an inference that may have arisen from a particular ruling when there is the possibility of other inferences. It is not a proper subject of judicial notice.

For example, if the ultimate outcome of the underlying criminal case was based on the belief that McCulley did not have the necessary criminal intent to commit aggravated assault on the officers by charging them with a knife because of the effect of mental illness, that does not mean he did not in fact charge them with a knife. The officers should not be precluded from testifying in the civil case that McCulley charged them with a knife just because the charges were reduced in a plea bargain to remove the allegation of use of a dangerous weapon. As it stands now,

that may very well be the result given the Order of the Court of Appeals' blanket granting of McCulley's motion for judicial notice.

5. McCulley contended the Court of Appeals could take judicial notice "That [he] did not charge the two officers with a deadly weapon, to wit: a knife."

This is, and has been throughout this case, a highly disputed fact. It is not the kind of fact that can be judicially noticed. None of the pleadings or papers to which McCulley pointed in his Motion for Judicial Notice demonstrate his assertion that he did not charge the officers with a knife. Those pleadings and papers do not provide evidence, let alone the kind of proof necessary before a court can take judicial notice, that McCulley did not charge the officers with a deadly weapon. In fact, the district court record is replete with evidence to the contrary, including affidavits from the officers involved, and statements from McCulley that admit he was armed with a knife that night, that he knew the officers were at his house, and that he otherwise has very little memory of the incident.

McCulley pled no contest to two lesser-included offenses: aggravated assault on a peace officer while engaged in the execution of any official duty. A reduction of the original charges as part of a plea bargain does not mean McCulley did not charge the officers with a knife. The plea bargaining process necessarily involves a reduction in the original charge, a reduction of the maximum sentence, or both, as an incentive to move criminal cases through the system. It is not a commentary on the validity or the legitimacy of the original charges.

6. McCulley contended the Court of Appeals could take judicial notice that "*Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994) is not applicable" to this case.

McCulley contended the Court of Appeals could take judicial notice that "*Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994) is not applicable" to this case.

See the discussion above under the first reason for granting this Petition for Writ of Certiorari, regarding the applicability of *Heck v. Humphrey,* 512 U.S. 477, 487, 114 S.Ct. 2364, 2372 (1994).

7. McCulley contended that "[he] was ultimately found not guilty, period."

There is no evidence of this whatsoever, but by stating, "McCulley's motion for judicial notice is granted," the court of appeals has bound the district court and has highly prejudiced the Appellees.

8. McCulley contended "This Court can also take judicial notice of documents filed in state court actions that were relevant to mater (sic) at hand."

This request for judicial notice is ambiguous at best. It certainly is not the kind of "fact" about which the court can take judicial notice.

CONCLUSION

For the reasons stated above, the Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

DARYL A. AUDILETT
Senior Partner

November 2004

APPENDIX A

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 02-16677
CT/AG#: CV-98-00371-RCC

DENNIS DAVID MCCULLEY

Plaintiff-Appellant

v.

CITY OF TUCSON; TUCSON POLICE DEPT.; CHIEF SMITH, Chief, Tucson Police Department; CAPTAIN LEVITT; CAPTAIN DANNAHER; CAPTAIN DAYKIN; RAUL OLIVAS, aka Detective Olivas; KEN THOMSON; KAREN WRIGHT, aka Detective Wright; EDMUND SCHWENN, aka Officer Schwenn; BRIAN PEASLEY, aka Officer Peasley; Officer KOURATOU; GEORGE MILLER, Mayor;

Defendants-Appellees

(Filed Aug. 20, 2004)

APPEAL FROM the United States District Court for the District of Arizona (Tucson).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona (Tucson) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED in part; VACATED in part and REMANDED.

Filed and entered FEBRUARY 12, 2004

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS DAVID McCULLEY, Plaintiff-Appellant, v. CITY OF TUCSON; TUCSON POLICE DEPT.; et al., Defendants-Appellees.	No. 02-16677 D.C. No. CV-98-00371-RCC MEMORANDUM* (Filed Jun. 19, 2003)

Appeal from the United States District Court
District of Arizona
Ranier C. Collins, District Judge, Presiding

Submitted June 9, 2003**

Before: RYMER, THOMAS, and SILVERMAN, Circuit Judges.

Dennis David McCulley appeals pro se the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging that the Tucson Police Department violated his rights under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, when police officers shot him after he threatened them with a knife. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Barnett v.*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, McCulley's request for oral argument is denied.

Centoni, 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). We affirm.

Because McCulley failed to file his action within two years of when he knew or should have known of his injuries, the district court properly dismissed his action as time-barred. *See TwoRivers v. Lewis,* 174 F.3d 987, 991 (9th Cir. 1999) (applying a two-year statute of limitations to 42 U.S.C. § 1983 claims brought in Arizona); *see also Madden-Tyler v. Maricopa County,* 943 P.2d 822, 829 (Ariz. Ct. App. 1997) (applying two-year statute of limitations to ADA and Rehabilitation Act claims).

The district court properly determined that McCulley was not entitled to tolling of the limitations period based on an unsound mind because it appears from the record that at the time the causes of action accrued, McCulley understood that he had been shot and believed that officers used poor judgment. *See Florez v. Sargeant,* 917 P.2d 250, 253-54; *see also Doe v. Roe,* 955 P.2d 951, 963-64 (Ariz. 1998) (en banc).

McCulley's contention that Arizona's former disability imprisonment statute tolls his action lacks merit because McCulley was not incarcerated at the time the causes of action accrued. *See Krug v. Imbordino,* 896 F.2d 395, 397 (9th Cir. 1990).

Contrary to McCulley's contention, the district court properly concluded that defendants did not induce McCulley to forbear filing suit. *See Nolde v. Frankie,* 964 P.2d 477, 480-81 (Ariz. 1998) (stating standard for demonstrating estoppel based on forbearance).

The district court did not abuse its discretion in denying McCulley's request to amend his second amended

complaint because amendment would be futile. *See Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998).

We do not consider McCulley's continuing violation contention because he did not raise it below. *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2002).

McCulley's remaining contentions lack merit.

We deny all pending motions.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS DAVID McCULLEY, Plaintiff-Appellant, v. CITY OF TUCSON; TUCSON POLICE DEPT.; et al., Defendants-Appellees.	No. 02-16677 D.C. CV-98-00371-RCC Arizona (Tucson) ORDER (Filed Feb. 12, 2004)

Before: RYMER, THOMAS, and SILVERMAN, Circuit Judges.

The unpublished memorandum disposition filed June 19, 2003 is withdrawn. A memorandum disposition filed concurrently with this Order is filed in its place.

Appellant's petition for panel rehearing is denied.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS DAVID McCULLEY, Plaintiff-Appellant, v. CITY OF TUCSON; TUCSON POLICE DEPT.; et al., Defendants-Appellees.	No. 02-16677 D.C. No. CV-98-00371-RCC MEMORANDUM* (Filed Feb. 12, 2004)

Appeal from the United States District Court
District of Arizona
Raner [sic] C. Collins, District Judge, Presiding

Submitted February 4, 2004**

Before: RYMER, THOMAS, and SILVERMAN, Circuit Judges.

Dennis David McCulley appeals pro se the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging that the Tucson Police Department and various individuals violated his constitutional rights, the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act, when police officers shot him after he threatened them with a knife. We have jurisdiction under 28 U.S.C.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, McCulley's request for oral argument is denied.

§ 1291. We review de novo. *Barnett v. Centoni,* 31 F.3d 813, 816 (9th Cir. 1994) (per curiam). We affirm in part, vacate in part and remand.

McCulley's 42 U.S.C. § 1983 action arose from his September 7, 1995 arrest. On October 8, 1996, McCulley was convicted of aggravated assault. On August 10, 1998, McCulley brought his section 1983 action. On January 18, 2000, McCulley's conviction was overturned.

We affirm the district court's dismissal of McCulley's ADA and Rehabilitation causes of action as barred by the statute of limitations. *See Madden-Tyler v. Maricopa County,* 943 P.2d 822, 829 (Ariz. Ct. App. 1997) (applying two-year statute of limitations to ADA and Rehabilitation Act claims).

Regarding McCulley's remaining constitutional claims, the district court properly determined that McCulley was not entitled to tolling of the limitations period based on an unsound mind because it appears from the record that at the time the causes of action accrued, McCulley understood that he had been shot and believed that officers used poor judgment. *See Florez v. Sargeant,* 917 P.2d 250, 253-54; *see also Doe v. Roe,* 955 P.2d 951, 963-64 (Ariz. 1998) (en banc).

McCulley's contention that Arizona's former disability imprisonment statute tolls his action lacks merit because McCulley was not incarcerated at the time the causes of action accrued. *See Krug v. Imbordino,* 896 F.2d 395, 397 (9th Cir. 1990).

Contrary to McCulley's contention, the district court properly concluded that defendants did not induce McCulley to forbear filing suit. *See Nolde v. Frankie,* 964 P.2d

477, 480-81 (Ariz. 1998) (stating standard for demonstrating estoppel based on forbearance).

The record indicates that McCulley's aggravated assault conviction was overturned on January 18, 2000. Because causes of action for false arrest, false imprisonment and warrantless search and seizure do not accrue until the underlying criminal charges have been dismissed or the conviction has been overturned, *see Harvey v. Waldron,* 210 F.3d 1008, 1014-15 (9th Cir. 2000), McCulley could not have brought his constitutional claims until the conviction was overturned because they would have been barred by *Heck v. Humphrey,* 512 U.S. 477 (1994). Accordingly, the district court erred in dismissing McCulley's constitutional claims as statutorily barred. *See Harvey,* 210 F.3d at 1016.

We deny all pending motions.

We AFFIRM the district court's grant of summary judgment on McCulley's ADA and Rehabilitation causes of action. We VACATE and REMAND for further proceedings on McCulley's section 1983 claims.

Each party shall bear its own costs on appeal.

AFFIRMED in part; VACATED in part and REMANDED.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS DAVID McCULLEY, Plaintiff-Appellant, v. CITY OF TUCSON; TUCSON POLICE DEPT.; et al., Defendants-Appellees.	No. 02-16677 D.C.# CV-98-00371-RCC Arizona (Tucson) ORDER (Filed Apr. 29, 2004)

Before: RYMER, THOMAS, and SILVERMAN, Circuit Judges.

Appellant's motion for an extension of time to answer the petition for panel rehearing is construed as a request to file an answer to Appellees' petition for panel rehearing under Fed. R. App. P. 40(a)(3), and is granted. Appellant shall file his answer within 30 days of the date of this order.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS DAVID McCULLEY, Plaintiff-Appellant, v. CITY OF TUCSON; TUCSON POLICE DEPT.; et al., Defendants-Appellees.	No. 02-16677 D.C.# CV-98-00371-RCC Arizona (Tucson) ORDER (Filed Aug. 4, 2004)

Before: RYMER, THOMAS, and SILVERMAN, Circuit Judges.

McCulley's motion for judicial notice is granted.

The City of Tucson's petition for panel rehearing is denied.

No further filings shall be accepted in this closed appeal.

APPENDIX F

NO. 02-1667

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DENNIS DAVID McCULLEY, AS A DISABLED INDIVIDUAL, Appellant/Petitioner, v. "THE PUBLIC ENTITIES," and/or "PROGRAMS OR ACTIVITIES," of CITY OF TUCSON, AND the TUCSON POLICE DEPARTMENT (TPD), and it's [sic] CHIEF SMITH, and CAPTAINS(S) [sic] LEVITT, DAYKIN, DANAHER, AND OTHER OFFICERS AND DETECTIVES LISTED AT "2-A-"2B" AND MAYOR MILLER, Defendants/Appellees.	NO: CV-98-371-RCC **APPELLANT'S MOTION FOR JUDICIAL NOTICE; AND MOTION FOR THE REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULES OF EVIDENCE, 106 AND 803**

COMES NOW the Appellant, Dennis David McCulley, ("McCulley"), and respectfully requests that this Court take Judicial Notice of Adjudicated Facts, pursuant to Federal Rules Civil Procedure, (Fed.R.Civ.Proc.), Rule 201(2)(a-f); and to further allow the Remainder of or Related Writings or Recorded Statements, pursuant to Fed.R.Civ.Proc., Rules of Evidence, Rule 106, and Rule 803(3)(8), as related to the issue of "favorable termination" of McCulley's underlying criminal case, in Pima County Superior Court, CR-50819. These motions are more fully supported by the attached memorandum of points and authorities, and the attached exhibits.

RESPECTFULLY SUBMITTED this ___ day of May, 2004.

BY:_____
Dennis David McCulley,
Pro Se, and as a
Disabled Individual

MEMORANDUM OF POINTS AND AUTHORITIES

Fed.R.Civ.Proc., Rule 201 allows for judicial notice of adjudicative facts, under subsections (a) through (h). McCulley contends that this Court of Appeals may take judicial notice of pleadings filed in related state court action. *Burbank-Glendale-Pasadena Airport Auth. v. Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998); *Opoka v. I.N.S.*, 94 F.3d 392, 394 n. 3-5 (7th Cir. 1996); *Zurok v. V Secret Catalogue, Inc.*, 215 F.Supp.2d 310, 313 N. 1-2 (D.N.J. 2002); *Hott v. City of San Jose*, 92 F.Supp.2d 996, 998 n.1 (N.D.Cal. 2000). McCulley did ask the district court to consider the remainder of related writings or recorded statements and to take judicial notice of adjudicated facts. (C.I. 202) (See Appellant's 2nd informal brief at page 18)

The central issue here, is that McCulley requests that this court take judicial notice of is, whether there is evidence that McCulley's ultimate conviction and sentence was a "favorable termination" and were not based on the original complaint; and whether there was evidence that the trial Court determined that McCulley's mental condition was relevant; and that he did not charge the two officers with a deadly weapon, to wit: a knife.

It should be noted that McCulley only plead no contest on 10/23/2001, only after the trial court told him that ("It means in your mind you are probably not guilty, you think you are not.") (Exhibit 1, at Page 8) McCulley contends that the trial court's ruling, in his criminal case, finally determined both on October 21, 2002, and on April 1, 2004, that McCulley did not charge the officers with a deadly weapon. (Exhibit 2, Court Minute Entry, Exhibit 3 ORDER, and Exhibit 4 transcript of hearing.)

The criminal trial court had previously stated, during McCulley's 10/8/1996 Judgment and Sentence Hearing that ("Technically I guess he was found just simply aggravated assault on a police officer while engaged in the execution of an official duty, although there is no specific finding, as I recall, that it was dangerous nature [sic] deadly weapon.") (Exhibit 5 at page 1)

The Pima County Prosecutor guidelines for determining when a class 6 felony for an assault on a police officer, can be charged as a misdemeanor, clearly takes into account the actions of the officers involved, by stating ("Misdemeanor assault charges may also be appropriate where the suspect's conduct would otherwise call for class 6 felony charges, but the officer's behavior has been unnecessarily provocative or overbearing, or the resulting injury to the suspect is disproportionately severe to the injury inflicted upon, or sought to be inflicted upon, the officer.") (Exhibit 6 at #3)

Further a "public record," from McCulley's Amended Petition For Post Conviction Relief, Rule 32, (Exhibit 5 at Page 1, 2, 50-57) also support that fact that McCulley argued to the trial court that the officers ("Could not have

been in "reasonable apprehension" of "Imminent" Physical Injury.") (Exhibit 7)

This is now evidence that this court may take judicial notice of, in support of the argument that *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S.Ct. 2364, 2372 (1994) is not applicable.

The criminal trial court, also certainly took into account the well documented evidence of McCulley's mental condition and evidence of an "insanity defense", before, during and after the incident of September 7th, 1995. The Appellees' Answering Brief, at page 16, however claims that ("McCulley demonstrated he knew of no evidence upon which he could base an allegation that he was unable to manage his affairs during the time period of September 7th, 1995 and thereafter.")

McCulley's Rule 32, Post-Conviction Relief Petition, and specifically the testimony from the Evidentiary Hearing, held 11/30/1999 clearly address the issues of McCulley's mental conditions, and are supported by the arguments made in *Drummond Ex. Rel., Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2002), this court may consider (Exhibit 8, 11/30/1999-McCulley's Rule 32 Evidentiary Hearing, at Page 1, 5 6, 12, 13, 14, 18, 19, 21, 24, 26, 27, 28, 29, 30, 31, 37) clearly show McCulley's mental condition, before, during, and after the incident of September 7th, 1995).

McCulley further stated in his 2nd informal brief at page 8 that his Rule 32 Petition, in his criminal case, was GRANTED on January 4th, 2000, based on evidence of an insanity defense; and that the original judgment and sentence was vacated January 18, 2000, (*citing C.I.* 130,

195, 219). This included, among other exhibits the affidavits of Dr. Flynn and Dr. LaWall. McCulley stated in his 2nd informal brief at page 9, specific information from the affidavits; and then stated that the district in it's [sic] ORDER (C.I. 221) that it made no reference to the affidavits of Dr. Flynn, Dr. LaWall, or Dr. Mardis, nor did it say anything from the evidence based on TPD's Van Ardoy report. (See C.I. 219)

McCulley is asking this Court to allow these remainder of or related writings or recorded statements, pursuant to Fed.R.Civ.Proc., Rule 106, which states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

See Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988). (The common-law "rule of completeness,") which underlies Federal Rule of Evidence 106, was designed to prevent exactly the type of prejudice of which [McCulley] complains.

McCulley is asking this Court to allow, pursuant to Fed.R.Civ.Proc., Rules of Evidence Rule 803(3) the then existing mental, emotional, or physical condition, as they related to McCulley's mental condition, before, during and after the incident of September 7th, 1995; (See Rule 32 Evidentiary Hearing, Exhibit 4 stated above.) Further pursuant to Rule 803(8) for Public records and reports, from the Pina County Prosecutor's Office, regarding the agencies procedure converting a Class 6 felony for aggravated assault on a peace officer to a misdemeanor, (Exhibit 7).

McCulley stated in Appellant/Petitioner's 2nd Informal Brief ("2nd I.B.) at page 2, that is [sic] First Complaint, pro se was filed July 6th, 1998. (C.I. 221 at Page 3. McCulley presented the juror's letter from his criminal case in (2nd L.B [sic] at pge 3,) demonstrating that the jury only believed that "perhaps McCulley was guilty of aggravated assault.." (C.I. 123, 127, Exhibit 1 McCulley's continued claim, both in the trial Court, CR-50819, and in his (2nd I.B) was that he never charged the officers with a knife., and that he didn't know that it was the police who reentered his home, after they left; and that the officers never identified themselves as police officers when they reentered. (2nd I.B. at pages 15, 16, 17)

The Defendants/Appellees Answering Brief at page 2, 3, continued to argue that "McCulley came at them with a knife.." The Appellees referred (*Id., at page 6* ("McCulley was sentenced on October 8, 1996). This is crucial to the issue of "favorable termination," regarding the fact that the original underlying criminal charge was pursuant to A.R.S. section 13-1204(A)(2) and (C), the October 23, 2001 no contest plea agreement, [after McCulley was told that he meant that he believed he was not guilty], to aggravated assault on a peace officer, pursuant to A.R.S. section 13-1204(A)(5) and (B), with the resulting sentence on October 21, 2002 being a misdemeanor charge.

A.R.S. section 13-1203 Assault, is defined as:

A. A person commits assault by:

2. Intentionally placing another person in reasonable apprehension of of [sic] imminent physical injury;

B. Assault committed intentionally or knowingly pursuant to subsection A, paragraph 2 is a class 2 misdemeanor.

A.R.S. section 13-1204. Aggravated assault; classification

A. A person commits aggravated assault if the person commits assault as defined in section 13-1203 under any of the following circumstances:

2. If the person uses deadly weapon or dangerous instrument

C. Aggravated assault pursuant to subsection A, paragraph 1 or 2 of this section committed on a peace officer while the office [sic] is engaged in the execution of any official duties is a class 2 felony.

McCulley plead no contest, to A.R.S. Section A. As described above, and 5, B, after the Court told him that it meant that he believe [sic] in his own mind that he was not guilty, A.R.S. section 13-1204 A(5) states that:

> If the person commits the assault knowing or having reason to know that the victim is a peace officer, or a person summoned and directed by the officer while engaged in the execution of any official duties.

(B) States that:

> Except pursuant to subsection C of this section, aggravated assault pursuant to subsection A, paragraph 5 of this section is a class 6 felony.

It is important to the issue of "favorable termination" to note that the Court sentenced McCulley pursuant to A.R.S. section 13-702(G) which states that:

> Notwithstanding any other provision of this title, if a person is convicted of nay [sic] class 6 felony not involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument and if the court, having regard to the nature and circumstances of the crime and the history and character of the defendant, is of The opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a class 1 Misdemeanor and make disposition accordingly or may place the defendant on probation in accordance with chapter 9 of this file and refrain from designating the offense as a felony or misdemeanor until the probation is terminated. The offense shall be treated as a Felony for all purposes until such time as the court may actually enter an order designating the offense as misdemeanor. This subsection does not apply to any person who stands convicted of a class 6 felony and who has previously been convicted of two or more felonies. If a crime or public offense is punishable in the discretion of the court by a sentence as a class 1 misdemeanor, the offense shall be deemed a misdemeanor if the prosecuting attorney:
>
> 1. Files an information in superior court designating the offense As a misdemeanor.
>
> 2. Files a complaint in justice court or municipal court designating The offense as a misdemeanor within the jurisdiction of the Respective court.

3. Files a complaint, with the consent of the defendant, before or During the preliminary hearing amending the complaint to charge A misdemeanor.

Based upon the language of that statute, and based upon the court having ordered the case designated a misdemeanor, McCulley contends that the Court, in fact, made the factual findings that McCulley was completely innocent of the original charge, which had as a necessary element of the charged offense the use/or threatening exhibition of a deadly weapon (a knife). McCulley further contends that when the court designated the offense a misdemeanor, he necessarily found McCulley not guilty of the original charge, which had as a necessary element of the offense a fact that could not exist if the case was to be designated a misdemeanor. When the court designated McCulley's offense a misdemeanor, given the language of 13-702(G), the court had to, and did, make a finding that one of the necessary elements of the original offense was not there. McCulley was ultimately found not guilty, period. This then, was a "favorable termination."

On April 1, 2004, the trial Court further displayed this fact of a "favorable termination," when it granted McCulley's motion, pursuant to A.R.S. section 13-907 (Exhibit's 2-4).

13-907 **Setting aside judgment of convicted person on discharge; making of application; release from disabilities; exceptions.**

A. Except as provided in subsection B of this section, every person convicted of a criminal offense may, upon fulfillment of the conditions of probation or sentence and discharge

by the court, apply to the judge, justice of the peace or magistrate's successor in office to have the judgment of guilt set aside. The convicted person shall be informed of this right at the time of discharge. The application to set aside the judgment may be made by the convicted person or by the convicted person's attorney or probation officer authorized in writing. If the judge, justice of the Peace or magistrate grants the application, the judge, justice of the peach [sic] or magistrate shall set aside the judgment of guilt, dismiss the accusation or information and order that the person be released from all penalties and disabilities resulting from the the conviction other than those imposed by the department of transportation pursuant to section 28-3304, 28-3307 or 28-3308, except that the conviction may be used as a conviction if such Conviction would be admissible had it not been set aside and May be pleaded and proved in any subsequent prosecution of Such person by the state or any of its subdivisions for any offense Or used by the department of transportation in enforcing the provisions of section 28-3304, 28-3306, 28-3307 or 28-3308 as if the judgment of guilt had not been set aside.

B. This section does not apply to a person convicted of a criminal offense:

2. Involving the use or exhibition of a deadly weapon or dangerous instrument

McCulley realizes that this statute itself is proof that restoration of civil rights under section 13-907 does not expunge or remove the *fact* of conviction in Arizona. *Russell v. Royal Maccabees Life Ins. Co.*, 974 F.2d 443, 447

n. 3 (Ariz.App. Div. 1 1998). However, McCulley does not offer 13-907 for any purpose other than the fact that again the court had to make a decision on the crime "involving the use or exhibition of a deadly weapon or dangerous instrument. Based upon the language of this statute, and based upon the court having granted McCulley's motion pursuant to A.R.S. section 13-907, the Court again, made the factual findings that McCulley was completely innocent of the original charge which had as a necessary element of the charged offense the use/or threatening exhibition of a deadly weapon (a knife). When the Court granted this motion, after hearing testimony from TPD Officers' Schwenn and Peasley, and McCulley's argument that he only went toward the door in his home to close it, the morning of September 7th, 1995, that he necessarily found McCulley not guilty of the original charge, which had as a necessary element of the offense a fact that could not exist if the Court was going to grant McCulley's motion pursuant to section 13-907(A)(B)(2). The central elements, and the issue of "favorable termination" was the charge against McCulley, based on the alleged use of a deadly weapon. Based on the language of 13-907(B), the Court had to, and did, make a finding that one of the necessary elements of the original offense was not there.

Again, **MCCULLEY WAS ULTIMATELY FOUND NOT GUILTY, PERIOD.. APPELLEES ANSWERING BRIEF CLAIM**

McCulley stated in his 2nd informal brief at page 39-40 the issues from the affidavits of Dr. Marids, Dr. LaWall and Dr. Flynn; and that his disability was causing conditions that caused him not to be able to work, and manage the ordinary affairs of his life. The Appellee/Respondent's in their Answer at page 16 stated that McCulle [sic]

demonstrated he knew of no evidence upon which he could base an allegation that he was unable to manage his daily affairs during the time period of September 7, 1995 and thereafter. (See also Appellee's Answer at page 19

McCulley contends that the Appellees' Answering Brief argument at Page 12, that the trial Judge, in McCulley criminal case, "considered with more weight that the juror's intentions," the feelings of Officers' Peasley and Schwenn, is now directly related to the issue of "favorable termination," and their arguments based on *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S.Ct. 2364, 2372 (1994). Further the Appellees' argue in their Answering Brief at Page 16, that McCulley does not suggest that he was found incompetent in his criminal trial or that he required special assistance with his ordinary daily affairs while incarcerated. McCulley has stated that an amended complaint will actually answer these requirements, both from his Rule 32 Petition, Hearing, and the Court's findings in the criminal case. (See Appellant/Petitioner's 2nd Informal Brief at Pages [sic] 4, citing (C.I. 113, 114, 122) Page 8, 9 citing (C.I. 195, at P. 6, and Exhibits) C.I. 219 at Page 2, 3), Page 16 (Disputing applicability of *Heck*), and Pge 33 (Defendants have acknowledge [sic], McCulley's judgment and sentence were vacated January 14, 2000; and McCulley, in an amended complaint will be able to show new facts that he has not been recharged or convicted of the same alleged crime of assaulting the officers with a deadly weapon, or knife.); and at Page 35 (the judgment and sentencing was vacated on ineffective assistance of counsel; and finally at Page 39-40, McCulley argued that the complaint can be amended.

The Court of Appeals could take judicial notice of state court documents showing filing dates for state

petitions for post-conviction relief, because those documents have direct relationship to ["favorable termination"] and the tolling of statute of limitations, and the applicability of *Heck. (See Smith v. Duncan*, 274 F.3d 1245, as amended, opinion amended and superseded 297 F.3d 809 (2001) This Court can also take judicial notice of documents filed in state court actions that were relevant to mater [sic] at hand. *Hott v. City of San Jose*, 92 F.Supp.2d 996, affirmed 22 Fed.Apps. 799 (2000); *and see Zdrok v V. Secret Catalogue Inc*, 215 F.Supp.2d 510 (2002); *Weizmann Institute of Science v. Neschis*, 229 F.Supp.2d 234 (2002).

CONCLUSION

McCulley respectfully requests that this Court grant his Motions pursuant to Fed.R.Civ.Proc., Rule 106. 201, and 803 McCulley respectfully request [sic] that this court now consider the related documents, relating to McCulley's mental condition at the time of the incident, and the evidence that the trial court, in McCulley's criminal trial, finally determined that McCulley was not guilty of charging the officers with a knife or deadly weapon.

RESPECTFULLY SUBMITTED this ___ day of May, 2004.

_____

Dennis D. McCulley, Pro Se,
and As a Disabled Individual

CERTIFICATE OF MAILING

STATE OF IOWA)
) SS.
COUNTY OF POTTAWATTAMIE)

DENNIS D. McCULLEY, being first duly sworn, deposes and says that on ___ day of May, 2004, he served the attorneys for the parties herein by placing two copies of the foregoing in a sealed envelope, first class postage prepaid and affixed, and deposited same in the United States mail, addressed to:

Daryl Audilett, Esq.
Kinble [sic]**, Nelson & Audilett**
335 N. Wilmont, Suite 500
Tucson, AZ 85711
Telephone: (520) 748-2440
Attorney for Defendants/Appellees

And sending the original and 3 copies via U.S. Post Office Express Mail, pursuant to FRAP 40, of the foregoing attached to Appellant's Answer, sent to:

Clerk, United States Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

/s/ Dennis D. McCulley
Dennis D. McCulley

SUBSCRIBED AND SWORN to before me this 21 day of May, 2004, by DENNIS D. McCULLEY.

/s/ Carrie Schaaf
Notary Public

[SEAL]	CARRIE SCHAAF Commission Number 223170 MY COMMISSION EXPIRES JUNE 22, 2005

APPENDIX G

	PATRICIA A. NOLAND CLERK, SUPERIOR COURT
ARIZONA SUPERIOR COURT, PIMA COUNTY	January 12, 2000 (10:55 a.m.) By: Vicki L. Freeland
JUDGE: HON. HOWARD HANTMAN	CASE NO. **CR-50819**
COURT REPORTER: Holly Sack	DATE: January 4, 2000
STATE OF ARIZONA	Kenneth Peasley
VS.	
DENNIS DAVID MCCULLEY	David Bjorgaard

MINUTE ENTRY

STATUS CONFERENCE RE: RULE 32 PETITION:

Defendant present, in custody.

Mr. Bjorgaard advises the Court that the defendant has withdrawn his request to have Mr. Bjorgaard withdrawn as counsel and wishes to proceed with the Rule 32 Petition.

The Court questions the defendant regarding his desire to have Mr. Bjorgaard represent him in this matter.

THE COURT FINDS that the defendant's previous counsel provided ineffective representation of the defendant.

IT IS ORDERED the Rule 32 Petition is GRANTED.

Mr. Bjorgaard makes an oral Motion to Release the defendant.

IT IS ORDERED the Motion is DENIED at this time and setting bond in the amount of $35,000.00 secured.

Mr. Peasley makes an oral Motion for a Stay of the order and release of the defendant.

Over defense counsel's objection,

IT IS ORDERED the Motion is GRANTED and setting a STATUS CONFERENCE and HEARING ON DEFENDANT'S MOTION TO MODIFY CONDITIONS OF RELEASE on January 14, 2000, at 8:30 a.m. in Division 16.

Mr. Bjorgaard is directed to contact Pretrial Services prior to the hearing.

At the request of Mr. Peasley,

The Court states for the record the basis for the Court's findings of ineffective representation by previous counsel.

FILED IN COURT: Conditions of Release

Vicki L. Freeland
Deputy Clerk

cc: Hon. Howard Hantman
Criminal Calendaring
County Attorney – Peasley
David Bjorgaard, Esq.
Clerk of Court – Appeals
Attorney General – Tucson

APPENDIX H

IN THE SUPERIOR COURT,
PIMA COUNTY, ARIZONA

THE STATE OF ARIZONA, Plaintiff, v. DENNIS DAVID MCCULLEY, Defendant.	)))))))	NO. CR-50819 PLEA AGREEMENT

The State of Arizona and the Defendant agree to the following disposition of this case on the following terms and conditions:

I. SPECIFIC TERMS:

A. THE PLEA: The Defendant, DENNIS DAVID MCCULLEY, agrees to plead guilty to the charge(s) of:

AMENDED COUNT ONE: (AGGRAVATED ASSAULT ON A PEACE OFFICER, A CLASS SIX FELONY)

On or about the 7th day of September, 1995, DENNIS DAVID MCCULLEY assaulted EDMUND R. SCHWENN, a peace officer while engaged in the execution of any official duty. In violation of A.R.S. §§ 13-1204(A)~~(2)~~(5) [DM] and ~~(C)~~(B) [DM] [KP], 13-603, 13-701, 13-702, ~~13-801~~ [DM], ~~13-804~~ [DM], ~~13-811~~ [DM] and ~~13-812~~ [DM].

AMENDED COUNT TWO: (AGGRAVATED ASSAULT ON A PEACE OFFICER, A CLASS SIX FELONY)

On or about the 7th day of September, 1995, DENNIS DAVID MCCULLEY assaulted BRIAN M. PEASLEY, a peace officer while engaged in the execution of any official duty. In violation of A.R.S. §§ 13-1204(A)~~(2)~~(5) and ~~(C)~~(B)

[KP], 13-603, 13-701, 13-702, ~~13-801~~ [DM], ~~13-804~~ [DM], ~~13-811~~ [DM] and ~~13-812~~ [DM].

B. THE SENTENCING RANGE

IF TREATED AS A FELONY, and the Defendant is sentenced to prison by the Court, the following statutory sentencing ranges apply:

1. Substantial Mitigated Sentence:	.33 years
2. Minimum Sentence:	.50 years
3. Presumptive Sentence:	1.00 years
4. Maximum Sentence:	1.50 years
5. Substantial Aggravated Sentence:	2.00 years

IF TREATED AS A MISDEMEANOR, the Defendant may be incarcerated up to six months in jail and/or required to pay a maximum fine of up to $2,500 per misdemeanor plus a 60% surcharge. The Defendant could be placed on probation with up to six months in the Pima County Jail and be assessed a monthly probation fee.

For a Class 1 Misdemeanor, the length of probation is 3 years.

C. RELEASE/PAROLE: If sentenced to prison, the Defendant must serve approximately 85 percent of his/her sentence before he/she is eligible for release on any basis. Upon completion of the prison sentence, the Defendant shall be placed on community supervision. The amount of community supervision shall be one day for every 7 days of the prison sentence imposed. Violation of community supervision could result in serving that time in prison.

D. PROBATION: Whether probation shall be granted is within the sole discretion of the court. This agreement is not a commendation for probation. As a condition of

probation, the Defendant may be incarcerated 12 months in the Pima County Jail and may also be assessed a monthly probation fee. The terms and conditions of probation are subject to modification at any time during the period of probation if the defendant violates any written condition of probation.

E. RESTITUTION: This case does not involve restitution to any victim.

F. FINES/ASSESSMENTS: The Court may require the defendant to pay a fine of $150,000 plus a surcharge of 77% for a total amount of $265,500. If the defendant is unable to pay any fine or assessment in full on the day of sentencing, he/she shall pay a one time $12.00 time payment charge.

G. FORFEITURE: This plea agreement does not include a forfeiture.

II. SPECIAL TERMS:

The parties agree that sentencing shall be delayed for a period of 364 days. If the Defendant successfully completes this period of time without committing any further criminal offenses, the State will not object to the Court designating the offenses as misdemeanors.

The Defendant understands that if the Court grants probation, the terms and conditions are subject to modification at any time during the period of probation in the event he violates any written condition of his probation. The Defendant may be allowed to move and serve his probation in Nebraska, at the discretion of the Court.

Additionally, the Defendant has offered and agreed that he shall not pursue and will drop any pending civil excessive force actions against Officer Edmund R. Schwenn and Officer Brian M. Peasley in their individual capacities.

Any interlineation or alteration of this printed plea agreement which is not initialed by the undersigned Deputy County Attorney renders this plea agreement null and void.

III. STANDARD TERMS:

A. DISMISSAL OF OTHER CHARGES: All other charges and allegations in this case are dismissed. Unless rejected or withdrawn, this agreement amends the charges filed in this case, to the offense(s) set forth above.

B. REJECTION OR WITHDRAWAL OF THE PLEA: This plea agreement is binding on the State and the Defendant when entered into at the change of plea, whether or not the Court accepts this plea at the change of plea. If at any time thereafter the Court concludes that any of the terms or conditions of this agreement are unacceptable, both parties shall be given the opportunity to withdraw from this agreement, or the Court can reject this agreement. The Defendant agrees that this agreement contains his/her true name and that he/she has no prior felony convictions other than those set forth in any Allegation of Prior Conviction filed in this case. Should either of these representations be inaccurate, the Court may reject, or the State may withdraw from this agreement. The State also may withdraw from this agreement if the Defendant is charged with or commits a crime between the time of this agreement and the time for sentencing in this case.

Should the Court reject or the State or the Defendant withdraw from this agreement, the Defendant gives up his right to any probable cause determination on the original charges in this case and waives all claims of double jeopardy.

C. OTHER FORFEITURES: Nothing in this agreement shall be construed to affect the outcome of any forfeiture action connected with the facts of this case, instituted by any State, United States, or Federal Agency, unless a statute expressly provides to the contrary. There has been no agreement concerning such a proceeding now pending, or which could be filed in the future.

D. APPEALS, MOTIONS, DEFENSES: The Defendant agrees that he/she may not appeal from the judgment entered or sentence imposed as a result of this plea agreement. See A.R.S. § 13-4033. Unless this agreement is rejected or withdrawn, the Defendant gives up any motions, defenses or other matters which he/she has asserted or could assert in this case. If the Defendant obtains a new trial, any pending charges dismissed as a result of this agreement shall be reinstated at the request of the State, and the State shall be free to file any additional charges not previously filed.

E. WAIVER OF RIGHTS: The Defendant understands the following rights and that he gives up such rights by pleading guilty: his/her right to a jury trial; his/her right to confront the witnesses against him/her and cross-examine them; his/her right to present evidence and call witnesses in his/her defense, knowing that the State will compel witnesses to appear and testify; his/her right at trial to be represented by counsel appointed free of charge, if he cannot afford to hire his/her own; his/her right to

remain silent, to refuse to be a witness against him/herself, and to be presumed innocent until proven guilty beyond a reasonable doubt.

F. AGREEMENT CONTAINS ALL TERMS: This written agreement contains all the terms and conditions of this plea agreement. The Defendant understands that any promises made by anyone, including his lawyer, that are not contained within this written agreement, are null and void. Any prediction or promise as to what the possible sentence will be is understood to be voided by this agreement.

ACKNOWLEDGEMENT AND SIGNATURES

I DENNIS DAVID MCCULLEY agree to be bound by the terms and conditions of this plea agreement and acknowledge the following: I am currently taking Carbamazepine 200 MG once a day, for my bipolar affective disorder, manic depression mental illness and Hydrochlorothiazide 25 MG once a day for high blood pressure; but am not under the under the [sic] influence of any other drug, medication, liquor, or other intoxicant. My plea is not the result of force, threats, assurances, or promises other than those which are contained in writing in this agreement. I have read this agreement with the assistance of counsel, or advisory counsel, I am pro per in this case. I understand its terms and understand the rights I give up by pleading guilty. If I am granted probation by the Court, the terms and conditions of probation are subject to modification at

any time during the period of probation in the event that I violate any written condition of my probation.

10/23/2001
DATE

/s/ Dennis McCulley
DENNIS DAVID MCCULLEY,
PRO SE DEFENDANT

I have reviewed this agreement. I concur that the terms and conditions of the plea are appropriate and in the interests of justice. I affirm that reasonable efforts have been made to confer with the victim(s), where required. Reasonable efforts have been made to give the victim(s) notice of this plea, the right to be present and an opportunity to be heard.

BARBARA LAWALL
PIMA COUNTY ATTORNEY

September 10, 2001

/s/ Kenneth Peasley
KENNETH PEASLEY
DEPUTY COUNTY
ATTORNEY

(3)

No. 04-604

Supreme Court, U.S.
FILED
NOV 29 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

"THE PUBLIC ENTITIES," and/or "PROGRAMS OR ACTIVITIES," of CITY OF TUCSON, and the TUCSON POLICE DEPARTMENT (TPD), and its CHIEF SMITH, and CAPTAIN(S) LEAVITT, DAYKIN, DANAHER, AND OTHER OFFICERS AND DETECTIVES LISTED AT "2-A-2B," and MAYOR MILLER,

Petitioners,

v.

DENNIS DAVID McCULLEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS D. MCCULLEY
Plaintiff/Pro Se
942 W. Camino Guarina
Green Valley, AZ 85614
(520) 207-6250

QUESTIONS PRESENTED

Should not this Court deny certiorari where:

[1] the case is controlled by *Heck v. Humphrey*, 512 U.S. 475, 487, 114 S.Ct. 2364, 2372 (1994), which states that ("the plaintiff [must] demonstrate that the conviction or sentence [A.R.S. section 13-1204(A)(2) and (C)] has already been invalidated. [And] if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding [misdemeanor] criminal judgment against the plaintiff, the action should be allowed to proceed. Citing Note #7);

[2] the Ninth Circuit Court of Appeals Took Judicial Notice of The Laws Stated Herein; and

[3] when the criminal trial court, in McCulley's case designated the offense a misdemeanor, given the language of A.R.S. section 13-702(G), and 13-907(A)(B)(2), the court had to, and did, make a finding that one of the necessary elements of the original offense was not there, is one that may judicially be noticed; and resulted in a "favorable termination"?

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INTRODUCTION

Petitioner's argument that Respondent McCulley's post-conviction relief due to ineffective assistance of counsel did not result in a 'favorable termination' of the underlying criminal convictions pursuant to *Heck v. Humphrey* because the charges remained pending even after the petition was granted, clearly misses the point of McCulley's Motion for Judicial Notice. Moreover, it does not answer the central argument, whether the Ninth Circuit abused it's discretion by taking judicial notice of the laws of the State of Arizona, which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. And whether the criminal trial court's determination, based on those laws, indicated a 'favorable termination'? The language of the statutes, and based upon the criminal trial court having ordered the case designated a misdemeanor on October 23, 2001; and then on April 1, 2004 granting McCulley's Motion to Set Aside Conviction and ORDERING in-part: [1] The judgment and conviction in this case is set aside and vacated; [2] The plea of guilty is withdrawn; [3] The indictments/citations/complaints are dismissed with prejudice, was a 'favorable termination' and a finding that McCulley was found not guilty of the original underlying charge, of the use of a deadly weapon.

STATUTES AND RULES INVOLVED

The statutes and rules involved are Rule 201, Federal Rules of Evidence; Rule 40(a)(3), Federal Rules of Appellate Procedure; and Rule 31.1, Arizona Rules of Criminal

Procedure; and Arizona Revised Statute section(s) 13-1204(A)(2) and (C); 13-1204(A)(5) and (B); 13-702(G); and 13-907(A)(B)(2), set out in full as follows:

STATEMENT OF THE CASE

On August 17, 2000, the Arizona Court of Appeals MEMORANDUM DECISION, was filed in 2 CA-CR 00-0056-PR, Department A, regarding the trial court granting McCulley's Rule 32 Petition, based on evidence of an insanity defense. This court granted the Petition for Review from The Superior Court of Pima County, in Cause No. CR 50819, but denied relief. The Arizona Appeals Court concluded that the evidence demonstrated that McCulley had a long history of bipolar affective disorder, dating to at least 1986; and that he was manic and apparently actively psychotic at the time of this incident in September 1995. The balance of the opinion clearly stated demonstrated the basis of that opinion.

On October 23, 2001, McCulley first pled guilty to A.R.S. section 13-1204(A)(5) and (B). (Petitioners Exhibit H) This charge did not include any element of use of a deadly weapon or dangerous weapon. The trial court then attempted to determine what happened, and McCulley stated that he didn't know and asked to present his UMC first disclosure statement. McCulley was not allowed to do so, and the State suggested a plea of no contest. McCulley stated he didn't know what that meant, and the court stated "It means in your mind you are probably not guilty, you think you are not. If it went to a jury, they could find you guilty and – we know [the] jury found [you] guilty under different evidence." A no contest plea was allowed

with the understanding that after 364 days of probation, with no further criminal offense the State will not object to the Court designating the offenses a misdemeanor. 364 days later the court designated the offenses a misdemeanor.

Arizona Revised Statute section 13-702(G), Rules for Sentencing state that:

G. Notwithstanding any other provision of this title, if a person is convicted of any class 6 felony not involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument and if the court, having regard to the nature and circumstances of the crime and the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly or may place the defendant on probation in accordance with chapter 9 of this file and refrain from designating the offense as a felony or misdemeanor until the probation is terminated. The offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense as a misdemeanor. This subsection does not apply to any person who stands convicted of a class 6 felony and who has previously been convicted of two or more felonies. If a crime or public offense is punishable in the discretion of the court by a sentence of a class 1 misdemeanor, the offense shall be deemed a misdemeanor if the prosecuting attorney:

1. Files an information in superior court designating the offense as a misdemeanor.

2. Files a complaint in justice court or municipal court designating the offense as a misdemeanor within the jurisdiction of the respective court.

3. Files a complaint, with the consent of the defendant, before or during the preliminary hearing amending the complaint to charge a misdemeanor.

(Petitioners' Appendix, F at App. 18-19)

Pima County Prosecutor Guidelines at P. 2 Stated that:

2.B. Where the offense is charged as a class 6 felony, no injuries inflicted in the victim, the defendant has no criminal history and no priors, with victim input, a plea to a misdemeanor or waiver to city/justice is authorized.

3. Misdemeanor Assault (Charging and/or pleas):

Charging or pleading an assault on a police officer as a misdemeanor is appropriate if the assault does not fall within the circumstances listed above, and the officers concur in a negotiated lesser plea. Misdemeanor assault charges may also be appropriate where the suspect's conduct would otherwise call for class 6 felony charges, but the officer's behavior has been unnecessarily provocative or overbearing, or the resulting injury to the suspect is disproportionately severe to the injury inflicted upon, or sought to be inflicted upon, the officer.

On April 1, 2004, the trial Court further displayed the fact of "favorable termination," by granting McCulley's Motion to Set Aside (Petitioners' Appendix F, at App. 19-21); after full arguments by the State, and after Officers Schwenn and Peasley had an opportunity to state their

positions and McCulley presented his position at the hearing, pursuant to A.R.S. section 13-907.

This statute is fully set forth in Petitioners' Petition for a Writ of Certiorari at P. 5-6, and in their Appendix at F, PP. 19-21. The Order stated in-part that: [1] The judgment and conviction in this case is set aside and vacated; [2] The plea of guilty is withdrawn; [3] The indictments/citations/complaints are dismissed **with prejudice**. (Appendix H)

In September 1995, Dennis McCulley was arrested, charged with, and convicted of two counts of Aggravated Assault with a Dangerous Weapon on a Police Officer Engaged in Official Duties. The trial court at Judgment and Sentencing on October 8, 1996 stated that "technically I guess he was found just simply aggravated assault on a police officer while engaged in the execution of an official duty, although there is no specific finding, as I recall, that it was dangerous nature deadly weapon." (Appendix I) McCulley's medical condition, i.e., a bipolar/manic depressive, who took several medications, and who saw a psychiatric doctor, Dr. Nelson, was known both to TPD Officers' Schwenn and Peasley, (Appendix J, K), and to the investigating Detectives Olivas and K. Thomson, knew a great deal more TPD also ignored a report, just forty-eight hours earlier by Officer Van Ardoy who documented McCulley's mood swings, rapid speech and paranoid thinking about the police being at his home. (Appendix M) TPD also knew from a UMC psychiatric report of Dr. Mardis that McCulley's latest episode was manic, with congruent psychotic features.

McCulley's manic episode had caused him to start drinking Tuesday, September 5, 1995. (Appendix N, O, P)

at some time just after midnight on September 7th, 1995, decided that he needed to get to the hospital, West Center.

The incident resulted from inaccurate information from TPD's 911 dispatchers/call-takers. (Appendix Q, R) McCulley was calling 411 information, misdialed, got 911 and before speaking to anyone hung up. 911 recontacted, and asked McCulley if he needed police or medical unit. McCulley replied "No, he was OK." 911 probed as to why a call had been made and McCulley told them he was calling 411 information. 911 seemed OK with this response. The time was 12:20 a.m. (Appendix Q, R) At 12:24 a.m., that morning, McCulley did call 911 and spoke with a Bouchard. He told her that someone had been knocking on his door, and when he went to the door, there was no one there. McCulley told Bouchard that the person said "help." Bouchard asked some probing questions and then concluded that the person probably went to another door, because they didn't get a response. When McCulley indicated that he still didn't know what to do, Bouchard told him that she would have an officer check the area. And if he didn't see anyone at his door, he should go ahead and go back to bed. The time was 12:24. A text message then went out to field officers saying "comp says someone was banging on his door yelling for help. He thinks they are gone now. He does now want contact, but wants officer to check area." This inaccurate information was the reason TPD Officers Schwenn and Peasley were sent to McCulley's residence.

Officer Peasley was contacted first at 12:31 a.m., and told "copy 911 hang up, 450 E. Lee. Male subject is indicating a recontact, that someone was banging on his door for help. He's not sure they're gone now or what. He had no description of who it was or anything." TPD had just

combined the 911 hang up with the information from the second call and had repeated the inaccurate information to Officer Peasley. Officer Peasley believed he was responding to a 911 hang up call.

Officer Peasley stated in his first disclosure statement at the common practice of TPD in entering to secure a residence, by doing a protective sweep based on 911 hang up calls being considered as domestic violence calls. Officer Peasley further clarified at McCulley's trial he knew he didn't have accurate information when he gave the jury his reasoning to enter, based on the fact that "when you get a 911 hang up call, if you get supplemental information, it can be from different calls. It can be confused by the dispatchers. It's not always correct." Peasley explained that he was treating the call as a domestic violence call which allowed them to enter to secure the residence. **Petitioners have consistently concealed this information from the Arizona District Court, and the Ninth Circuit Court of Appeals, and now this Court.** The Petitioners' statements in their Petition for a Writ of Certiorari at PP. 6-7 are intentionally misleading.

Officer Peasley, at McCulley's trial, stated that they weren't sure exactly what was going on, and that the information was kind of confusing as to why a 911 call had been made. Officer Peasley described McCulley's words and actions when they wanted to enter as "he was intimidated, the fact that the police were at his house." The officers entered just after 12:42 a.m.

The officers did a protective sweep of the house, found McCulley to be alone and unhurt, but instead of leaving Officer Peasley told McCulley what he should and

shouldn't do when calling 911 and that he shouldn't hang up. Then Officer Schwenn, seeing a liquor bottle in the kitchen, asked McCulley if he had been drinking, and then McCulley started crying. Officer Schwenn stated that McCulley told them that he was fearful about an ex-tenant "Joe" who had lived there about a month earlier, had a key, and McCulley was fearful that he was trying to get in and kill him. Petitioners' statements were simply false.

According to Officer Peasley, at this point they learned that McCulley was seeing a doctor, Dr. Nelson, the kind of medications he took, and that McCulley was diagnosed as bipolar. Peasley even indicated that he knew one of the medications McCulley took because of his experience at the jail a few years earlier. Officer Peasley then said that McCulley started to talk a little bit more normal and they were going to leave. They told McCulley to close and lock the front door, but McCulley wouldn't come over to the door and lock it. McCulley again started crying "saying that he was scared."

Officer Schwenn described McCulley saying, "He's gonna kill me, they're gonna kill me." Schwenn replied, "No one's gonna kill you, you're fine, we're going to be coming back tonight and make sure you're fine, [by just] driving by." Schwenn would later say that McCulley was "saying that he wanted to die," however, neither officer said anything like this in their first disclosure statements. Schwenn then described McCulley as "he just, he wasn't listening, he wasn't responding to it [and] he started kind of rocking and looking real strange and he started mumbling . . . saying words, you can understand he was saying something, and it was weird." Then McCulley jumped up out of the chair, ran into the bedroom and slammed the door.

Schwenn did say that at this point they went outside, to call Sgt. Walters, and just back off; and that McCulley "was upset but he had never mentioned anything about killing himself yet or anything like that yet." Schwenn later said "he might of said he wanted to die, [but] he was upset . . . wasn't making any sense, wasn't listening to us."

Schwenn stated he was using the front door as cover, and Peasley was looking into McCulley's bedroom window. Schwenn described what happened next saying that when he heard McCulley first coming out of the bedroom it was then that he [allegedly] started saying, "I'm going to kill myself. I want to die." Schwenn said "No you don't we want to get you help, that's why we're getting somebody else here." McCulley, said, "Who you talking to? You're not talking to me. I don't want to die, are you going to shoot me?" Peasley, however, was recorded as saying at this point that "He's now stepped out of the bedroom. He now says he wants to die. He wants us to shoot him." According to Officer Peasley's first disclosure, this was the first time McCulley [allegedly] said anything about wanting to die.

Schwenn said, McCulley came out of the bedroom and "as soon as he came out and headed towards the kitchen, I drew my weapon. And [then] he grabbed the big knife first. Schwenn said "drop the knife, drop the knife," McCulley said, "shoot me . . . shoot me." McCulley went back into his bedroom, and Schwenn then called Officer Peasley in and said that McCulley had picked up a knife.

McCulley in his UMC first disclosure statement said that "he went to the kitchen to get a knife, and protect himself." And "he was just going in and out of phases, not really knowing who was there." McCulley said, "see I thought they came, and I thought they left, and then, I

didn't know, I didn't lock my door." And he "didn't know who was there, so he got that [knife] to protect himself, and then he was in his bedroom, and barricaded himself." And that he got the knife "because he thought, he didn't know who was out there, he couldn't see. And he just remember saying if it was a her, or [if] it was a him, but [if] he was a police officer, he didn't say, 'I'm a police officer, drop the knife.'"

Officer Schwenn confirmed in a deposition that at McCulley's trial he said that after McCulley went into his bedroom, he, nor Officer Peasley ever said again that in fact they were police officers.

Schwenn described McCulley as coming out of the bedroom on two different times, and saying "close the door, close the door," and retreated. Both times Schwenn refused. and then McCulley put down one of the knives.

The shooting story of Officer Schwenn changed throughout his first disclosure statement, from shooting McCulley at the front door of his home, to shooting him four or five feet away.

Officer Peasley's first disclosure statement, shows that in 520 words, that McCulley ran into the room, jumped on the couch, hit the wall and then was coming off the couch toward the door, and that the door closed halfway.

McCulley's statement was he [thought] he was shot just as he came around the corner into the living room. McCulley stated that at that point he thought it was the police and "walked out of the bedroom, and didn't remember what happened after that; and [wondered] whether he was carrying the knife in a threatening way. He said that

someone said "drop the knife," and it happened so fast that he didn't have a chance to drop the knife.

The officers have stated that they "tried to determine what to do, [but McCulley] ran at them with a large butcher knife and was then shot." This doesn't match their first disclosure.

The district court stated in an order dismissing McCulley's Complaint, filed July 15, 2002 at P. 3, N. 1, that the date of McCulley's filing his *pro se*, first 37-count complaint was on July 6, 1998, when he, as a prisoner gave it to prison officials for mailing. The district court dismissed the complaint, pursuant to a motion for summary judgment predicated on a statute of limitations argument. McCulley's Judgment and Sentence were on October 8, 1996. The Petitioners misrepresent the known facts in their statements to this Court by stating that the date of the filing of the first complaint was in August, 1998.

On October 23, 2001, McCulley pled no contest to A.R.S. section 13-1204(A)(5) and (B). This was done after the trial court refused to allow McCulley's UMC first disclosure statement as the factual basis of his plea. The Court told McCulley that a no contest plea "means in your mind you are probably not guilty, you think you are not. If it went to a jury, they could find you guilty and we know [that a] jury found [you] guilty under different evidence." It should be noted that McCulley argued to the Ninth Circuit that he should be allowed to show that this plea agreement was not voluntary. McCulley had presented over 150 arguments to the trial court, *pro se*, from February 22, 2000 to the October 23, 2001 plea hearing. The plea hearing was a direct result of those arguments.

McCulley's appeal to the Ninth Circuit Court of Appeals was denied on June 19, 2003. (*See* Petitioners' Appendix at C) McCulley filed on June 26, 2003 a Petition for Rehearing. McCulley claimed that, as defined in Fed.R.App.P., Rule 40 applied because (1) a material point(s) of fact or law had been overlooked in the decision; and (2) an apparent conflict with another decision of the Court was not addressed in the opinion.

McCulley stated that it was his understanding that the United States Supreme Court will not ordinarily consider issues neither raised before nor considered by court of appeals. *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 147-150, 90 S.Ct. 1598, 1602-04 (1970). McCulley then stated that "the Ninth Circuit seemingly based their contention that McCulley's claim was based on being shot by police officers after he [allegedly] threatened them with a knife. (*See* 9th Cir. Memorandum filed June 19, 2003, at p. 2). This was not the complaints basis.

McCulley then referred to his Rule 32 and the outcome; and to the fact that the factual allegations of the complaint, if they were accepted as true, and all reasonable inferences, which must be drawn in favor of McCulley, the nonmoving party, and a complete reading (Informal Opening Brief) of his (Informed Reply Brief) displays that the facts stated in the Complaint support that he did not know the people who reentered his home, after the police left, were police; that the officers who reentered his house never identified themselves as police officers, and that he never threatened then with a knife but instead retreated. (*See* C.I. 123, at #3 (45-55) (63-72), and #4 Injury of Counts VI, IX.)

McCulley stated his understanding of when federal law determines when a cause of action accrues. McCulley argued the apparent conflict with another decision of the Court which was not addressed. McCulley presented argument from *Veal v. Geraci*, 23 F.3d 732, 735-36 (2nd Cir. 1994); and *Morales v. City of Los Angeles*, 214 F.3d 1151-1155 (9th Cir. 2000). This was another case directly relevant to McCulley's case, where an individual was shot . . . and then the police perjury and other misconduct caused [the plaintiff] to loose that case, thus depriving them of their due process right of access to the courts. McCulley then stated the issue in *Morales*, as determined by the Ninth Circuit Court Judge Silverman which held that the statute of limitations began to run when the plaintiffs lose their case in trial court and have judgment entered against them.

McCulley further argued that "perhaps the defendants and their attorney have attempted to submit evidence that they knew was false and misleading, regarding the actual date McCulley gave his first disclosure at UMC, [and that it] was an attempt to show McCulley was not 'insane' on September 8th, 1995."

McCulley made other arguments and in his conclusion stated in-part that he possessed several legal remedies, reasonably and in good faith pursued ones designed to lessen the extent of his injuries or damage. *Citing Alberti v. San Francisco Sheriff's Dept.*, 12 F.Supp.2d 1164, 1171-1173 (N.D.Cal. 1998). He then argued that dismissal without leave to amend was improper. He then stated that the decision should be reversed.

On February 12, 2004, the Ninth Circuit held that McCulley could not have brought his constitutional claims

until the conviction was overturned because they would have been barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). And that the district court erred in dismissing McCulley's constitutional claims as statutorily barred. *See Harvey v. Waldron*, 210 F.3d 1008, 1016 (9th Cir. 2000). (Petitioners' Appendix B, p. 1-4)

On February 25th, 2004, the Appellees/Petitioners filed a Petition for Rehearing, and presented the fact of the October 23, 2001 determination by the trial court and the fact that McCulley was sentenced and the convictions were treated as class one misdemeanors. The Appellees argued that the final result in the federal court would have had to dismiss the case due to McCulley's ultimate convictions. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). (Appendix B)

The Ninth Circuit, on April 29, 2004, allowed McCulley to file his answer to the Appellees' Petition for Rehearing. (Petitioners' Appendix D)

On May 21, 2003, McCulley filed his Answer to Appellees' Petition for Rehearing. McCulley filed his answer, pursuant to Rule 40 of the Fed.R.App.P., to counter the claim that a material point of fact and law was overlooked in the decision filed February 12, 2004.

McCulley claimed in-part that an amended complaint "will be able to show new facts that he has not been recharged or convicted of the same alleged crime of assaulting the officers with a deadly weapon, a knife." *See Sappington v. Bartee*, 195 F.3d 234, 235 (5th Cir. 1999). McCulley referred to facts from his Informal Brief; and that he had raised the issue of his no contest guilty plea, plea discussion; and related statements, and in his reply to

the defendant's opposition to plaintiff's motion (C.I. 164, 171, 175, Exhibit A and Exhibit B).

McCulley argued at P. 4 the central issue of the case, i.e., "The Appellees in their Petition for Rehearing have raised the issue of pending criminal charges which resulted in a conviction. The Appellees in their Petition For Rehearing have raised the issue of the remaining pending criminal charges which resulted in a conviction. [And that] this issue [was] not found in their answer to this Court of Appeals. Therefore, McCulley contends that if this Appeals Court is going to allow their arguments in the Petition for Review that it must grant the Motion for Judicial Notice of Adjudicated Facts, pursuant to Fed.R.Civ.P., Rules of Evidence 201. . . . [And that] in fairness [the court] must now allow argu[ment] in a supplemental to this Answer, the voluntariness of a criminal defendant's guilty plea is questionable where a trial court exerts or even seems to exert the authority of its position to induce the defendant to plead guilty. *See Blase v. Appicelli*, 489 N.W.2d 129, 132 (Mich.App. 1992).

McCulley then referred to the relevant affidavits of UMC psychiatrist Dr. Mardis, and Tucson psychiatrist Dr. La Wall, and Psychologist Dr. Flynn.

McCulley, in his Conclusion stated that the Ninth Circuit did not rule on all factual allegations of the complaint in favor of McCulley, or accept as true all reasonable inferences, or draw them in favor of the nonmoving party as required. McCulley also argued the relevant juror's letter which was used throughout his complaint. McCulley stated that the Ninth Circuit made no mention or consideration of this letter.

McCulley argued that he possessed several legal remedies, reasonably and in good faith pursued ones designed to lessen the extent of his injuries or damages. *Citing Alberti v. San Francisco Sheriff's Dept.*, 12 F.Supp. 1164, 1171-1173 (N.D.Cal. 1998). And that "[D]ismissal without leave to amend [when the district court dismissed C.I. 113, 114, without prejudice] is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Citing Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1196 (9th Cir. 1998).

It was at this point that McCauley argued that "if this Appeals Court is going to allow their arguments in the Petition for Review that it must grant the Motion for Judicial Notice of Adjudicated Facts, pursuant to Fed.R.Civ.P., Rules of Evidence 201; and further allow McCulley, pursuant to Fed.R.Civ.P., Rules of Evidence 106, to respond with the remainder of or Related Writings or Recorded Statements, which ought in fairness to be considered contemporaneously with it, to fully address these issues."

McCulley further stated that he must now be allowed to argue in a supplemental to this Answer, the voluntariness of a criminal defendant's guilty plea is questionable where a trial court exerts or even seems to exert the authority of its position to induce the defendant to plead guilty. *Citing Blase v. Appicelli*, 489 N.W.2d 129, 132 (Mich.App. 1992).

Again McCulley discussed the fact that the issue from his 1983 claim was not based just on being shot, but rather the reentrance of McCulley's residence, the drawing of weapons, before McCulley grabbed a knife; and McCulley demonstrating that he didn't know it was a police officer by his statements to the officers and in his UMC statements.

McCulley then referred to his complaint, noting the facts of his mental illness that he alleged, and then the locations of the supporting facts in the complaint. McCulley then again stated his argument regarding excessive force and the mental illness issues, *citing* the Fourth Amendment to the United States Constitution, and *Drummond Ex Rel., Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003). McCulley then cited the Pima County Prosecutor's Office requirements as to when they can treat a class 6 felony as a misdemeanor.

McCulley also argued and presented evidence that TPD Detectives' Olivas and K. Thomson, conspired to procure groundless state indictments and charges, based upon fabricated evidence or false, distorted perjurious testimony presented to official body.

McCulley argued and demonstrated facts from his complaint that his superior court criminal conviction was overturned, and the pending charges did not result in a conviction based on the underlying criminal charge. McCulley stated that the legality of a search and seizure "would not necessarily imply that [McCulley's] conviction was unlawful." McCulley cited several cases in support.

McCulley then argued that actual innocence is not required, and cited the juror's letter. McCulley then stated that the "actual issue here that must be addressed if the Court allows Appellees to argue facts not responded to in their Answering Brief, is whether a misdemeanor sentence, based on the underlying charge pursuant to A.R.S. section 13-1204(A)(2) and (C), being resolved pursuant to A.R.S. section 13-1204(A)(5) and (B), with a sentence of misdemeanor, resulting from the Court judging the actions of the officers, and telling McCulley that [a no contest plea]

meant "he believed he was not guilty," is a 'favorable termination'? McCulley again stated that actual innocence is not required for a common law favorable termination. *Citing Uboh v. Reno*, 141 F.3d 1000, 1005 (11th Cir. 1998); *Smith v. Holtz*, 87 F.3d 108, 113 (3rd Cir. 1996) (*citing Restatement of the Law of Torts*, section 659, 660 (1938); *see also Janetka v. Dabe*, 892 F.2d 187, 190 (2nd Cir. 1998)

The Ninth Circuit, based on all these arguments, did grant McCulley's Motion for Judicial Notice. (*See* Petitioners' Appendix E) Notice of judicial notice was actually given when McCulley sent the Appellees/Petitioners both his Answer and the Motion for Judicial Notice.

McCulley's Motion for Judicial Notice; and Motion for the Remainder of or Related Writings or Recorded Statements Under Fed.R.Civ.P., Rules of Evidence 106 and 803, is fully set forth in Petitioners' Petition for A writ of Certiorari, Appendix F, The Appellees/Petitioners, an adversely affected party learned in advance that judicial notice was in contemplation, by virtue of being served with a copy of the request, on May 21, 2004. The Appellees' experienced lawyers did not request an opportunity to be heard at that point. Fed.R.Civ.P., Rules of Evidence 201(c)

McCulley argued that the [Ninth Circuit] court could take judicial notice of, whether there is evidence that McCulley's ultimate conviction and sentence was a "favorable termination" and were not based on the original complaint; and whether there was evidence that the trial Court determined that McCulley's mental condition was relevant; and that he did not charge the two officers with a deadly weapon, to wit: a knife.

McCulley fully stated all the statutes that directly relate to the issue of favorable termination. McCulley stated that he was ultimately found not guilty, period, McCulley stated that the Court of Appeals could take judicial notice of state court documents showing filing dates for state petitions for post-conviction relief; and the Court can also take judicial notice of documents filed in state court actions that were relevant to matter at hand, citing several cases in support of his arguments.

On August 4, 2004, the Court of Appeals filed its Order stating that "McCulley's motion for judicial notice is granted. The City of Tucson's petition for panel rehearing is denied. No further filings shall be accepted in this closed appeal." (*See* Petitioners' Appendix C and E) **Over 90 days later the Petitioner filed their Petition for a Writ of Certiorari. Fed.R.Civ.P., Rules of Supreme Court, R. 13(1).**

The respondents learned in advance that judicial notice was in contemplation, by virtue of being served with a copy of the request or Motion for Judicial Notice. The respondents request to be heard after the Ninth Circuit granted the motion for judicial notice was untimely. Fed.R.Civ.P., Rules of Evidence 201(e)

REASONS FOR DENYING THE WRIT

This aspect of the case is controlled by *Heck v. Humphrey*, 512 U.S. 475, 487, 114 S.Ct. 2364, 2372 (1994) ("the plaintiff [must] demonstrate that the conviction or sentence [A.R.S. section 13-1204(A)(2) and (C)] has already been invalidated. [And] if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding [misdemeanor]

criminal judgment against the plaintiff, the action should be allowed to proceed. *See* Note #7.)

The criminal trial court's allowing a no contest plea to A.R.S. section 1204(A)(5) and (B), on October 23, 2001, (Appendix D) with the resulting misdemeanor charge 364 days later, which was pursuant to A.R.S. section 13-702(G); and the facts surrounding the April 1, 2004, Motion to Set Aside, did result in a 'favorable termination' of the underlying criminal conviction, pursuant to A.R.S. Section 1204(A)(2) and (C), because the original underlying conviction or sentence had been invalidated; and McCulley's action, even if successful, will not demonstrate the invalidity of the outstanding misdemeanor criminal judgment against McCulley.

Heck v. Humphrey, 519 U.S. 475, 487 n.7, 114 S.Ct. 2364, 2373 n.7 (1994) states that "a suit for damages attributable to an alleged unreasonable search may lie even if the challenged search produces evidence that was introduced in a state criminal trial resulting in the section 1983 plaintiff's still-outstanding conviction. . . . Such a section 1983 action, even if successful would not necessarily imply that the plaintiff's [misdemeanor] conviction was unlawful."

McCulley's complaint was for an unreasonable search and seizure and for excessive force. McCulley's injury claim was that he never has been afforded the opportunity to present his evidence and arguments on the claim. *General Elec. Capital v. Lease Resolution*, 128 F.3d 1074, 1083 (7th Cir. 1997); *Walker v. Schaeffer*, 854 F.2d 138, 143 (6th Cir. 1988) ("did not have a reasonable and fair opportunity to litigate their contentions that defendants violated their constitutional or lawful rights under the

circumstances of their arrest and detention.") McCulley has never claimed that he was falsely arrested or falsely imprisoned.

McCulley's no contest plea to A.R.S. section 13-1204(A)(5) and (B), his sentencing pursuant to A.R.S. section 13-702(G); and after a full hearing of the facts the final ruling by the trial court to Set Aside Judgment, pursuant to A.R.S. section 13-907 which required a determination of the court under subsection (B)(2) [as to it] involving the use or exhibition of a deadly weapon or dangerous instrument, clearly met the requirement in *Heck* that "termination of the prior criminal proceeding in favor of the accused." *Id.* 512 U.S. at 484, 114 S.Ct. at 2371.

Other courts have stated that "a favorable termination depends on the surrounding facts." *In Re American Continental Corp.*, 102 F.3d 1524, 1537 (9th Cir. 1996); and that "Notwithstanding dismissal of the action, settlement may be a favorable termination." *Bradshaw v. State Farm Mut. Auto. Ins.*, 157 Ariz. 411, 758 P.2d 1313, 1321 (Ariz. 1988); *See Frey v. Stoneman*, 150 Ariz. 106, 110-11, 722 P.2d 274, 278-79 (1986); and *See also* Restatement section 674 comment j (favorable termination may arise from the withdrawal of the proceedings by the person bringing them").

The October 23, 2001 underlying charge was concluded by a plea settlement, after extensive arguments by McCulley, rather than an adjudication on the merits; [however] the termination may nonetheless be favorable to McCulley. *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 988 P.2d 143, 147 (Ariz. App. Div. 2 1994). The trial court knew the true facts of McCulley's case and "the true facts,

not the form of disposition, are determinative." *See Bradshaw*, 157 Ariz. at 419, 758 P.2d at 1321.

The April 1, 2004, Set Aside Judgment, pursuant A.R.S. section 13-907(A), with particular reference to subsection (B)(2) which states that this section does not apply to a person convicted of a criminal offense ... involving the use or exhibition of a deadly weapon or dangerous instrument, came after the State had a full opportunity to respond and then Officers Schwenn and Peasley had a full opportunity to testify, and the fact that McCulley again demonstrated his argument that he only went to the door to close it. The Order further included that: [1] the judgment and conviction in this case is set aside and vacated; [2] The plea of guilty is withdrawn; [3] The indictments/citations/complaints are dismissed with prejudice. McCulley had proven that the prior criminal proceeding, whatever it's extent, had terminated in his favor.... [and] there had been a *judicial ascertainment* of the fact that the arrest [based on the use of a knife] was unlawful, evidenced by [the] order dismissing the indictments/citations/complaints, with prejudice. *Heilig-Meyers Furniture Co.*, 525 S.E.2d 145, 147 (Ga.App. 1999).

This was clearly a judgment on the merits for McCulley after a trial, which is always a favorable termination. The termination here or dismissal indicates in some fashion that the accused [McCulley] is innocent of wrongdoing [using a deadly weapon] is a favorable termination. *Lane v. Terry H. Pillinger, P.C.*, 189 Ariz. 152, 939 P.2d 430, 432 (Ariz.App. 1 1997). Further the dismissal was without prejudice so that McCulley may reassert his claims ... and a successful section 1983 action for an unreasonable search "would not *necessarily* imply that [McCulley's] conviction [for a misdemeanor charge] was

unlawful." *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1993).

To hold that an acquittal does not constitute a favorable termination would be particularly inappropriate in this case, where the charge for which McCulley was acquitted was more serious than the one for which he was convicted. Aggravated assault on a police officer, under the facts of the case, was a misdemeanor, based on the juror's letter, and the actual facts and statements from TPD Officers Schwenn and Peasley. *See Janetka v. Dabe*, 892 F.2d 187, 190 (2nd Cir. 1989). The circumstance, known to the trial court clearly indicated the innocence or freedom from liability of McCulley, and under these particular circumstances and merits of the underlying case, termination was actually favorable. *Frey v. Stoneman*, 150 Ariz. at 278-279. *See also Day v. Zubel*, 922 P.2d 536, 539 (Nev. 1996).

Proceedings are "terminated in favor of the accused" only when their final disposition is such as to indicate the accused is not guilty, in this case of the use of a deadly weapon, a knife. *Singleton v. City of New York*, 632 F.2d 183, 193 (1980); Restatement (Second) of Torts section 660, Comments a & b (1977); and *see Lackner v. LaCroix*, 159 Cal.Rptr. 693, Cal. 602 P.2d 393, 394-95 (1980) ("a favorable termination must further reflect on his innocence of the alleged wrongful conduct"); *Owen v. Shores*, 24 Ariz. 250, 537 P.2d 978, 980-81 (1975); *Kelly v. Cooper*, 502 F.Supp. 1371, 1377 (1980) ("An essential element of this cause of action is that the proceedings terminate in a manner "not unfavorable" to the plaintiff.

THE NINTH CIRCUIT TOOK JUDICIAL NOTICE OF THE LAWS STATED HEREIN

In the first place, it must be established that the particular fact, i.e., that when the criminal trial court, in McCulley's case designated the offense a misdemeanor, given the language of A.R.S. section 13-702(G), the court had to, and did, make a finding that one of the necessary elements of the original offense was not there, is one that may be judicially noticed.

The Petitioners had an opportunity to be heard as to the propriety of taking judicial notice when McCulley filed his motion. There was no such request under Fed.R.Civ.P., Rules of Evidence 201(e), therefore, the fact that the court took judicial notice of a fact or the tenor of the notice taken **is not grounds for later appeal**. *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 24 Fed. R. Evid. Serv. 771, 10 Fed. R. Serv. 3d 810 (11th Cir. 1988).

Judicial notice may be taken at any stage of the proceedings, Fed.R.Civ.P., Rules of Evidence 201(f) And every fact upon which, in any view, depends the question whether a document purporting to be a statute has, by legislative action, been invested with the force of law is in its nature a public fact and will be noticed by the court in determining what is the law of the state.

A matter of law can be judicially noticed as a matter of fact, i.e., the court can look to the law not as a rule governing the case before it but as a social fact with evidential consequences. *City of Wichita, Kan. v. U.S. Gypsum Co.*, 72 F.3d 1491 (10th Cir. 1996).

The law is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably

be questioned," it has become common to speak of courts as taking judicial notice of the law. *Patterson v. City of Phoenix*, 103 Ariz. 64, 67, 436 P.2d 613, 616 (1968) ("in this state we take judicial notice of the statutes . . . ."); *Mercer v. Vinson*, 85 Ariz. 280, 288, 336 P.2d 854, 860 (1959) ("public statutes need not be plead or offered in evidence since courts will take judicial notice thereof"); *In Re Hindi*, 71 Ariz. 17, 222 P.2d 991 (1950) (Rule of Civil Procedure, R. 201); *Earhart v. Frohmiller*, 65 Ariz. 221, 178 P.2d 436 (1947); *Sweeney v. Winslow Gas Co.*, 64 Ariz. 51, 165 P.2d 316 (1946).

It was proper for the Ninth Circuit Court of Appeals to judicially notice matters outside the record, because they were generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to entrees whose accuracy cannot reasonably be questioned. *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 24 Fed. R. Evid. Serv. 771, 10 Fed. R. Serv. 3d 830 (11th Cir. 1998).

Based on the language of the statute, A.R.S. section(s): 13-1204(A)(5) and (B); 13-702(G); and 13-907(A) ("except as provided in subsection B"):

B. This section does not apply to a person convicted of a criminal offense:

> 2. Involving the use or exhibition of a deadly weapon or dangerous instrument,

and based upon the criminal trial court having ordered the case designated a misdemeanor, the Court, in fact, made the factual findings that McCulley was completely innocent of the original charge, pursuant to A.R.S. section 13-1204(A)(2) and (C), which had as a necessary element of

the charged offense the use/or threatening exhibition of a deadly weapon (a knife). When the court designated the offense a misdemeanor, he necessarily found McCulley not guilty of the original underlying charge, which had as a necessary element of the offense a fact that could not exist if the case was to be designated a misdemeanor or eventually set aside.

CONCLUSION

It would be inappropriate to grant certiorari on the issue of 'favorable termination,' or whether the Ninth Circuit Court of Appeals abused its discretion in taking judicial notice, particularly where the Petitioners were given notice, and failed to timely request an opportunity to be heard. The Ninth Circuit could take judicial notice of the laws and statutes of Arizona.

Respectfully submitted,

DENNIS DAVID MCCULLEY
Pro Se, and as a Disabled Individual

(2)

No. 04-604

Supreme Court, U.S.
FILED
DEC - 7 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

"THE PUBLIC ENTITIES," and/or "PROGRAMS OR ACTIVITIES," of CITY OF TUCSON, and the TUCSON POLICE DEPARTMENT (TPD), and its CHIEF SMITH, and CAPTAIN(S) LEVITT, DAYKIN, DANAHER, AND OTHER OFFICERS AND DETECTIVES LISTED AT "2A-2B", and MAYOR MILLER,

Petitioners,

v.

DENNIS DAVID McCULLEY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

There is no dispute that this case rests on the applicability of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), and on Fed. R. Evid. 201 regarding the kinds of facts that can be judicially noticed. Certiorari should be granted because the Ninth Circuit's decisions clearly violated both and if allowed to stand will result in manifest injustice to Petitioners.

ARGUMENT IN REPLY

Respondent argues that the granting of his Rule 32 motion; the language of Arizona Revised Statute § 13-702(G), the sentencing statute; the county attorney guidelines for reducing a charge from a class 6 felony to a class one misdemeanor; and the language of Arizona Revised Statute § 13-907(B)(2), the statute for setting aside a judgment, all point to a 'favorable termination' of his underlying convictions. He also points to those sources, and the lower courts' reliance on them in their decisions, as proof of his alleged innocence of assaulting the police officers with a knife. Respondent's arguments evidence his confusion between his *original* criminal charges and convictions, for Aggravated Assault with a Deadly Weapon on a Police Officer, with his *ultimate* convictions, of the lesser included-offenses of Aggravated Assault on a Police Officer. It is only the ultimate convictions that are relevant to the issue of favorable termination.

A. The granting of the Rule 32 Motion was not a "favorable termination."

The Ninth Circuit Court of Appeals was incorrect in its ruling of February 12, 2004, wherein it stated that Respondent could go forward with his § 1983 claims because those claims could not have been brought until after the granting of his Rule 32 motion, which, according to the Ninth Circuit, was a successful termination of the underlying charges. Case law is clear that a favorable termination requires a showing of innocence. The Rule 32 order only established that Respondent's trial attorney provided ineffective assistance; it did nothing to establish McCulley was innocent of the charges. The charges remained pending after the Rule 32 hearing, and Respondent later pled to them, reduced through plea bargaining to lesser-included offenses.

B. The plea to lesser-included offenses did not result in a "favorable termination."

The lesser-included offenses did not include the element of a deadly or dangerous weapon, but simply a *reduction* of the initial charges is not a *termination* of the prior criminal proceedings in favor of the accused, as required by *Heck*. *See Kent v. Katz*, 146 F.Supp.2d 450, 461 (2001) (defendant entered a plea bargain wherein he pled no contest to a lesser included offense. The court, in dismissing the § 1983 claim due to no favorable termination, noted this "does nothing to establish his innocence as to the original [] charge. Rather [it] leaves open the question of [his] guilt or innocence on the [original] charge."); *Nuno v. County of San Bernardino*, 58 F.Supp.2d 1127, 1139 (1999) (a charge being dismissed pursuant to a plea bargain is not a favorable termination for purposes of

Heck); *Coakley v. Jaffe*, 49 F.Supp. 615 (1999) ("Since the dismissal was . . . ' the result of compromise to which the accused agreed,' it was not a favorable termination and plaintiff's malicious prosecution claims, both under § 1983, must be dismissed."). Allowing Respondent to plead to lesser-included offenses that did not include the element of use of a deadly weapon does not reflect an opinion by the prosecution that the original action lacked merit or that it would result in a decision in favor of Respondent. *See Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004). The plea bargaining process necessarily involves a reduction in the original charge, a reduction of the maximum sentence, or both, as an incentive to move criminal cases through the system. It is not a commentary on the validity or the legitimacy of the original charges.

C. Reduction of the convictions to misdemeanors did not result in a "favorable termination."

Respondent was sentenced pursuant, in part, to Arizona Revised Statute § 13-702(G). He claims that in order for the court to sentence him for misdemeanors, the judge necessarily had to make a finding that Respondent did not use or exhibit a deadly weapon or dangerous instrument. Respondent's conclusion clearly evidences a misunderstanding of the statute. Arizona Revised Statute § 13-702(G) states that if a person is *convicted* of any class-six felony, not involving the intentional or knowing infliction of serious injury or the discharge, use or threatened exhibition of a deadly weapon or dangerous instrument, the court may consider reduction of the charge to a class one misdemeanor. (Page 3, Brief in Opposition). Respondent's convictions were

two counts of class-six felony aggravated assault. They were class six felonies because the element of use or exhibition of a deadly weapon or dangerous instrument had been withdrawn as part of the plea bargain. Those are the convictions that were reduced, at sentencing, to misdemeanors. Those are the convictions to which A.R.S. § 13-702(G) refers.

The Setting Aside of Judgment pursuant to Arizona Revised Statute § 13-907 was not a termination in Respondent's favor. Respondent misunderstands the statute. He points to the language of § 13-907(B)(2), which states that a person *convicted* of a criminal offense involving the use or exhibition of a deadly weapon or dangerous instrument cannot have the judgment set aside (emphasis added), as evidence that the trial court necessarily made factual findings that he was "completely innocent of the original charge" (Aggravated Assault with a Dangerous Weapon), because the judge could not have set aside the judgment of conviction if there had been use or exhibition of a deadly weapon. The convictions that were set aside were two counts of Aggravated Assault on a Peace Officer. There was no element of the use or exhibition of a dangerous or deadly weapon because that element had been dropped during the plea bargain.

D. The Ninth Circuit's Order granting the motion for judicial notice is plain error and seriously affects the fairness, public reputation, and integrity of judicial proceedings and results in manifest injustice to Petitioners.

The reason Petitioners did not file a response to the Motion for Judicial Notice, filed by Respondent with the Ninth Circuit Court of Appeals, is set forth in the Petition

for Certiorari at page nine. If this Court determines that Petitioners had a duty to respond by filing an opposition with the Ninth Circuit, Petitioners assert that this Court nonetheless has jurisdiction to decide the issue on the basis of plain error which seriously affects the fairness, public reputation, and integrity of judicial proceedings and which results in manifest injustice. *Delgado v. Reef Resort Ltd.*, 364 F.3d 642, 646 (5th Cir. 2004); *Retail Flooring Dealers of America, Inc. v. Beaulieu of America*, LLC, 339 F.3d 1146, 1150, n.5 (9th Cir. 2003); *Guides, Ltd. v. Yarmouth Group Property Management*, 295 F.3d 1065, 1075 (10th Cir. 2002); *U.S. v. Chavez-Marquez*, 66 F.3d 259, 261 (10th Cir. 1995). The Ninth Circuit's order stated simply, "McCulley's motion for judicial notice is granted." Included in the motion, among many other things, was the request to take judicial notice "that McCulley did not charge the two officers with a deadly weapon, to wit: a knife." Respondent could point to nothing in the record as proof of this assertion, except his interpretations of the decisions made by the judge in the underlying criminal case.

The Ninth Circuits' Order granting the motion for judicial notice is a glaring mistake on its face.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, Certiorari should be granted.

Respectfully submitted this 7th day of December, 2004.

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